TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. ~~769.~~ 236

UNION TRUST COMPANY OF SAN FRANCISCO AND ALBERT LACHMAN, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRIETTE S. LACHMAN, DECEASED, PLAINTIFFS IN ERROR,

vs.

JUSTUS S. WARDELL, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF CALIFORNIA, AND JOHN L. FLYNN, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF CALIFORNIA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

FILED FEBRUARY 23, 1921.

(28,119)

(28,119)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 762.

UNION TRUST COMPANY OF SAN FRANCISCO AND ALBERT LACHMAN, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRIETTE S. LACHMAN, DECEASED, PLAINTIFFS IN ERROR,

vs.

JUSTUS S. WARDELL, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF CALIFORNIA, AND JOHN L. FLYNN, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF CALIFORNIA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 5, 1921.

1 In the United States District Court for the Northern District of California, Southern Division, Second Division.

No. 16220.

UNION TRUST COMPANY OF SAN FRANCISCO (a Corporation), and Albert Lachman, as Executors of the Last Will and Testament of Henriette S. Lachman, Deceased, Plaintiffs,

vs.

JUSTUS S. WARDELL, United States Collector of Internal Revenue for the First District of California, Defendant.

Amended Complaint.

Now comes the Union Trust Company of San Francisco (a corporation) and Albert Lachman, as executors of the last will and testament of Henriette S. Lachman, deceased, and by leave of court, first had and obtained, hereby amend their complaint filed on the 31st day of January, 1919, and file this their amended complaint against said defendant, and complaining of said defendant above named, allege:

I.

That said Union Trust Company of San Francisco is a corporation duly incorporated, organized and existing under the laws of the State of California, with its principal place of business in the City and County of San Francisco, State of California; that it is a trust company, and is authorized by its articles of incorporation
2 and by the laws of said state to act as executor, administrator, guardian of estates, assignee, receiver, depositary or trustee; that it has fully complied with all of the acts of the Legislature of said state relating to trust companies, and particularly with the provisions of the "Bank Act" so far as said act relates to trust companies; that the Superintendent of Banks of said state has issued to said Union Trust Company of San Francisco, under the provisions of said "Bank Act," his written certificate stating that it has complied with the provisions of said act and all the requirements of the law, and that it is authorized to transact within said state the business of a trust company, and that said certificate is in full force and effect.

II.

That the defendant above named is, and at all times herein mentioned since the 17th day of April, 1917 has been, the duly appointed, qualified and acting United States Collector of Internal Revenue for the First District of California.

III.

That on and prior to the 31st day of May, 1901, said Henriette S. Lachman was the owner of 7,475 shares of the capital stock of the S. & H. Lachman Estate (a corporation), represented by certificates numbers 11, 12 and 13, and in addition thereto was also the owner of 25 additional shares of stock of the same company represented by other certificates, and on said day the said Henriette S. Lachman made, executed and delivered a certain deed or declaration of trust by which she assigned, transferred and set over said 7,475 shares of stock to Albert Lachman and Henry Lachman, as trustees, and in trust to pay the income therefrom to the said Henriette S. Lachman during her life, and upon her death to deliver 2,490 shares
3 thereof, represented by certificate No. 11 unto Henry Lachman, to be thenceforth held by him as his absolute property, and to deliver 2,495 shares thereof, represented by certificate No. 13, unto Albert Lachman, to be thenceforth held by him as his absolute property, and to deliver to Albert Lachman and Henry Lachman 2,490 shares, represented by certificate No. 12, in trust to pay the income derived therefrom unto Rebecca Metzger, wife of Leo Metzger and daughter of the said Henriette S. Lachman, and upon the death of the said daughter to hold the income and earnings derived from the said 2,490 shares, and expend the same according to their judgment for the benefit of the grandchildren of the said Henriette S. Lachman, and being the children of her said daughter, Rebecca Metzger, and the said trust instrument further provided that upon the youngest of said children attaining the age of majority all the then surviving children of the said daughter, Rebecca Metzger, should be immediately entitled to said 2,490 shares in equal proportions; the said deed or declaration of trust being in the words and figures following, to wit:

Alameda, Cal., May 31, 1901.

To Albert Lachman and Henry Lachman, my sons:

This is to certify that I have delivered to you seven thousand four hundred and seventy-five (7,475) shares of the capital stock of the S. & H. Lachman Estate, represented by certificates numbers eleven (11), twelve (12) and thirteen (13) respectively, however, upon the following trust:

To pay to me during my lifetime, all the income earned and derived therefrom, and, upon my death, to deliver two thousand four hundred and ninety (2,490) shrares, represented by certificates number eleven (11) unto Henry Lachman, thenceforth for his absolute property; two thousand four hundred and ninety-five (2,495) shares, represented by certificate number thirteen (13) unto Albert Lachman, thenceforth for his absolute property; and yourselves, to-wit, Albert Lachman and Henry Lachman, to hold two thousand four

hundred and ninety (2,490) shares, represented by certificate
4 number twelve (12) upon my death, in trust, paying the income derived therefrom unto my daughter, Rebecca, wife of Leo Metzer, and upon the death of my said daughter, the income and earnings derived from said two thousand four hundred and ninety (2,490) shares shall be held, or expended, by you, according to your judgment, for the benefit of my grandchildren, the children of my said daughter; Rebecca Metzger, and upon the youngest of said children attaining the age of majority, all the then surviving children of my said daughter, Rebecca Metzger, shall be immediately entitled to said two thousand four hundred and ninety (2,490) shares in equal proportions.

HENRIETTE LACHMAN.

At the time of the execution of said instrument, and at all times herein mentioned, the said Henriette S. Lachman was a resident of the State of California, and the said S. & H. Lachman Estate was at all times herein mentioned a corporation organized and existing under the laws of the State of California, and all the trustees and beneficiaries mentioned in said instrument were at all times herein mentioned likewise residents of the State of California, and the said instrument was made, executed and delivered in the State of California.

At the time of the execution of said instrument, the said Henriette S. Lachman was a widow, and on said date the only children of said Henriette S. Lachman were the said Henry Lachman, Albert Lachman and Rebecca Metzger, and she had no other children since that date.

IV.

Immediately upon the execution and delivery of the said deed or declaration of trust the said Henriette S. Lachman assigned, endorsed and delivered to the said trustees the said shares of stock, and they thereupon accepted said trust and became the owners of said 7,475 shares of stock upon the trusts therein specified and set forth, and
the said beneficiaries thereupon became entitled to the sev-
5 eral beneficial interests created in their favor by the said deed
or declaration of trust, and the title to the said shares of stock thereupon vested in the said trustees upon the trusts therein set forth, and the said trustees and the survivor of them continued in the possession and enjoyment of the said shares of stock upon the trusts aforesaid, and administered the said trust in accordance with the said instrument creating the said trust and transferring said stock to them until the termination of said trust as hereinafter alleged.

V.

Thereafter and on the 10th day of July, 1915, the said Henry Lachman died, leaving a will bequeathing his estate to said Henri-

ette S. Lachman, and plaintiffs are informed and believe, and therefore allege, that the said 2,490 shares of said stock which were to go to the said Henry Lachman upon the death of the said Henriette S. Lachman under said deed or declaration of trust passed to her upon the death of said Henry Lachman, and later became a part of her estate as hereinafter alleged. But the said Albert Lachman, as surviving trustee, continued to own and hold all of the said stock upon the said trusts until the termination of said trust as hereinafter alleged.

VI.

On the 13th day of July 1914, said Rebecca Metzger, one of the beneficiaries named in said deed or declaration of trust died, leaving three children, being grandchildren of said Henriette S. Lachman, namely, Elsa Metzger Davis, Vera Metzger Davis and Samuel Metzger, all of whom are still living, and the youngest thereof, to-wit: Samuel Metzger, attained the age of majority on September 19th, 1916. The said Elsa Metzger Davis and the said Vera Metzger Davis were daughters of said Rebecca Metzger and attained the age
6 of majority on the following dates, to-wit: Elsa Metzger Davis on the 24th day of July, 1908, and Vera Metzger Davis on the 13th day of October, 1911.

All of the said children of Rebecca Metzger were living at the date of said instrument of May 31, 1901, and said Rebecca Metzger never had any other children.

VII.

Thereafter and on the 14th day of November, 1916, the said Henriette S. Lachman died, being at the time of her death a resident of the County of Alameda, State of California, and leaving a last will and testament by which she appointed the plaintiffs herein executors of the said will, and leaving a large amount of property, to-wit: property of the value of the sum of three hundred and two thousand, nine hundred sixty-three dollars and sixty-four cents ($302,963.64), after deducting expenses of administration and other deductions allowed by the Federal Estate Tax Law hereinafter referred to, which property included the said 2,490 shares of said stock of the S. & H. Lachman Estate which passed to her upon the death of the said Henry Lachman, as aforesaid, and the 25 shares of stock in the same company mentioned in paragraph III hereof, but did not include the balance of the said shares of stock, to-wit: 4,985 shares thereof so transferred by the said Henriette S. Lachman on the 31st day of May, 1901, as aforesaid.

VIII.

That upon the death of the said Henriette S. Lachman the said surviving trustee delivered said 2,495 shares of said stock, represented by said certificate No. 13, to said Albert Lachman, and said 2,490 shares of said stock, represented by certificate No. 12, to the

7 said children of Rebecca Metzger, in accordance with the terms of said deed or declaration of trust, and thereupon said trust terminated and no part of said 4,985 shares of stock became part of the estate of said Henriette S. Lachman, deceased, nor did the same ever come into the possession of the executors of her last will and testament.

IX.

Thereafter and after due and regular proceedings had in the matter of the estate of the said Henriette S. Lachman, deceased, in the Superior Court of the County of Alameda, State of California, plaintiffs herein were duly appointed executors of the last will and testament of said Henriette S. Lachman, and thereafter and in due time the said plaintiffs duly notified the defendant of the death of the said Henriette S. Lachman and their appointment as such executors.

X.

Thereafter and in due time the said plaintiffs duly made and returned to the defendant herein a return for the federal estate tax on the estate of said decedent, setting forth therein all of the property of the said decedent and of her estate, including the said 2,490 shares of said stock of the S. & H. Lachman Estate which so passed to the said Henriette S. Lachman upon the death of the said Henry Lachman, and said 25 shares of stock in the same company above mentioned, but not including the balance of the shares of stock, to-wit: 4,985 shares thereof so transferred by the said Henriette S. Lachman on the 31st day of May, 1901, and which was not owned by the said decedent at the time of her death, or by her estate.

XI.

Notwithstanding the premises the Commissioner of Internal

8 Revenue of the United States thereafter made a purported assessment of an estate tax against the estate of the said Henriette S. Lachman in assumed compliance with the provisions of the Act of Congress of September 8th, 1916, by which the said commissioner purported to assess against the said estate of Henriette S. Lachman an estate tax computed not only upon all of the property belonging to the said Henriette S. Lachman at the time of her death, including the 2,490 shares of stock of the said S. & H. Lachman Estate which so passed to her upon the death of the said Henry Lachman, and said 25 shares of stock of the same company as above referred to, but also upon the balance of the said shares of stock of the said S. & H. Lachman Estate, to-wit: 4,985 shares thereof so transferred by the said Henriette S. Lachman on the 31st day of May, 1901, and thereupon did compute, levy and assess an estate tax against the said estate amounting to the sum of twelve thousand, one hundred sixty-four dollars and seven cents ($12,164.07); that of

the amount so assessed against the said estate $4,545.50 thereof was so levied and assessed by the Commissioner of Internal Revenue upon the said 4,985 shares of stock so transferred by the said decedent on the 31st day of May, 1901, and so owned by the said trustees and beneficiaries, and which were not owned by the said decedent or her estate, but which were nevertheless assessed by the said commissioner at the value of $113,638, and a tax assessed thereon amounting to the said sum of $4,545.50. Of said sum of $4,545.50, the sum of $2,-274.99 thereof was so computed upon the 2,495 shares of stock so belonging to Albert Lachman and ($2,270.51) thereof was so computed upon the 2,490 shares of stock so belonging to the children of said Rebecca Metzger.

9

XII.

Thereupon the defendant above named demanded payment of the said tax so assessed and the whole thereof, and in order to avoid the penalties prescribed by law, and in order to avoid a threatened seizure of the property of the said decedent, the said plaintiffs involuntarily, under coercion and under protest, paid the tax so assessed and demanded, and at the time of said payment delivered to the same defendant a written statement of the grounds of said protest in the words and figures following, to-wit:

San Francisco, Cal.,
November 19, 1918.

Hon. Justus S. Wardell,
Collector of Internal Revenue,
San Francisco, Cal.

SIR:

The undersigned, Union Trust Company of San Francisco and Albert Lachman, as executors of the last will of Henriette S. Lachman, deceased, hand to you herewith the sum of $6,636.31 being the amount claimed by the United States of America as an additional tax ($6,569.71) on the estate of said decedent, with interest thereon ($66.60) from October 12, 1918, to the date hereof. Said sum of $6,636.31 is paid to you in response to the notification and demand of the Commissioner of Internal Revenue of the United States and in response to a demand by you, and is paid involuntarily and under protest as to part of said demand, to-wit, $4,545.50 thereof, and the interest thereon from October 12, 1918, at the rate of 10% per an-um, for the purpose of avoiding the penalties prescribed by law and for the purpose of avoiding seizure and sale of any of the property of said estate.

The undersigned claim that said $4,545.50 of said additional tax, and said interest thereon, are illegally exacted, and state the following as the reasons therefor and as the grounds of this protest:

1. Said $4,545.50 of said additional tax is assessed and imposed upon 4,985 shares of the capital stock of S. & H. Lachman Estate, a corporation. On the 31st day of May, 1901, said shares of stock

were transferred and delivered by said decedent under a cer-
10 tain declaration of trust in writing made and executed by said decedent on said day to certain trustees named in said declaration. Said trustees accepted said trust on said day, and became the owners of said shares of stock upon the trusts set forth in said declaration of trust. Said trustees, and the survivor of them, continuously owned and held possession of said shares of stock, and continued in the discharge of their duties as said trustees until the termination of said trust, and the respective estates in said shares of stock created by said declaration of trust became vested property rights of the said trustees and of the beneficiaries named and designated in said declaration on said 31st day of May, 1901. None of said shares of stock was the property of said decedent at any time since said date. The said shares of stock are exclusive of the 2,515 shares of the stock of said S. & H. Lachman Estate enumerated in the return heretofore made and filed by the undersigned, and admitted to be part of the estate of said decedent.

2. The act of Congress, approved September 8, 1916, imposing the Federal estate tax, is not in terms or otherwise retroactive, and was not intended to and does not apply to any transaction whereby property was transferred, or whereby a trust in property was created prior to the date said Act became effective, nor to property rights or estates which became vested by transfer before the said Act became effective; and said Act cannot be construed to be retroactive or to apply to any such transaction or to such prior vested property rights or estates.

3. If the said act should be construed to be retroactive, or to be intended to apply to a transfer made before the passage of the said act, or to property rights and estates which became vested by transfer prior to the time that the said act became effective, the said act would be in violation of the Constitution of the United States in the following particulars:

(*a*) In that the same would take the property of the said trustees and of the beneficiaries under the said declaration of trust without due process of law in violation of the fifth amendment to the Constitution of the United States.

(*b*) In that the same would take private property, to-wit: the property of the said trustees and the beneficiaries under the said declaration of trust, for public use without just compensation in violation of the fifth amendment to the Constitution of the United States.

(*c*) In that if the said act applies or is construed to apply to a transfer made before the said act became effective, or to property rights and estates which vested before that time, the tax so imposed by the said act would not be a transfer tax or an indirect tax but would be a direct tax upon the property and the rights of property
11 of the said trustees and beneficiaries under the said declaration of trust, and as a direct tax upon the said property and rights the same would be in violation of article I, section 9, subdivision 4,

of the Constitution of the United States, because not laid in proportion to census or enumeration as therein provided.

4. In making the said transfer on the said 31st day of May, 1901, and in executing the said declaration of trust, dated May 31, 1901, the said decedent did not make a transfer of or create a trust with respect to any property in contemplation of, or intended to take effect in possession or enjoyment at or after her death, within the meaning of said Act of Congress.

The undersigned therefore ask and demand the refund of said \$4,545.50, and of the interest paid thereon.

UNION TRUST COMPANY OF SAN FRANCISCO,
By PERCY A. WOOD,
Its Assistant Secretary;
ALBERT LACHMAN,
As Executors of the Last Will of Henriette S. Lachman, Deceased.

XIII.

The said tax was so paid by the said plaintiffs on the 19th day of November, 1918, and thereafter and on the said 19th day of November, 1918, the said plaintiffs duly presented to the Commissioner of Internal Revenue of the United States their claim for a refund of the portion of the said tax so erroneously and illegally collected and paid under protest as aforesaid, which claim for refund was duly made upon the form and in accordance with the rules and regulations adopted by the Commissioner of Internal Revenue, and approved by the Secretary of the Treasury of the United States, and asked for the refund of the said sum of \$4,545.50 on the ground that the same was erroneously and illegally collected for the reasons set forth in said protest, all of which were set forth in said claim for refund, and the said claim for refund was duly subscribed and sworn
12 to by the said plaintiffs in the manner provided by law.

XIV.

Thereafter and on the 7th day of December, 1918, the Commissioner of Internal Revenue acted upon the said claim for refund, and thereupon denied and refused the same, and refused to order the refunding of said amount, or any part thereof, and the whole thereof is still retained by the said defendant and no part thereof has been refunded or repaid to the plaintiffs.

XV.

That the transfer so made and the trust so created by the said Henriette S. Lachman on May 31st, 1901, were made and created long prior to the passage of the said Act of Congress of September 8th, 1916, and the rights of the said trustees and the said beneficiaries

in and to the said 4,985 shares of stock, represented by certificates numbers 12 and 13, then and there became vested property rights.

At the time of said transfer and the creation of said trust, there was no law of the State of California, imposing any transfer, inheritance or other tax upon such a transfer to lineal descendants of the grantor or trustor, whether or not the same was made in contemplation of death, or intended to take effect in possession or enjoyment by said beneficiaries at or after the death of the grantor or trustor, and it has been judicially determined and decided by the highest courts of the State of California that such a transfer, even if in contemplation of death or intended to take effect in possession or enjoyment at or after death, created vested property rights in said beneficiaries, and that no law passed thereafter could impose any transfer or inheritance tax upon such transfer, nor was there at that time any law of the United States imposing any transfer, inheritance or
13 other tax upon such a transfer, except the War Revenue Act of 1898, which was repealed long before the death of said Henriette S. Lachman, and before any tax accrued thereunder.

But as a matter of fact, when the said transfer was made, the said Henriette S. Lachman was in good health and not in contemplation of death, and the said transfer was not made by her in contemplation of death, nor was it made for the purpose of avoiding any transfer or inheritance tax. That said grantor intended that the said transfer should take effect at once and in accordance with the legal effect of said transfer, and the said trustees immediately entered into possession and enjoyment of said property, and the said transfer or trust was not intended to take effect in possession or enjoyment only at or after the death of the said Henriette S. Lachman, but was intended to, and did, take effect in possession and enjoyment upon the date thereof. That as plaintiffs are informed and believe and therefore allege, the said Act of Congress should not be construed to be retroactive or to apply to a transfer or trust so made or created prior to the passage of said act, and — it be construed as applying to such a transfer or trust, the same is in violation of the Constitution of the United States for the reasons set forth in the said protest *and* above set forth herein, and that for the reasons aforesaid the said assessment was made erroneously and illegally, and the said amount so exacted and retained by the defendant was exacted erroneously and illegally and without authority of law, and that thereby the said plaintiffs and the persons interested in the estate of the said Henriette S. Lachman, deceased, and the beneficiaries of said trust were deprived of their property without due process of law in violation of the Constitution of the United States.

14 And plaintiffs further allege that there is no constitutional authority for the tax so exacted as applied to the transaction and transfer above set forth and alleged, and plaintiffs hereby invoke the protection of the Constitution of the United States against taxation not authorized thereby, and against taxation forbidden thereby, and also invoke the protection of the provisions of the Constitution of the United States above referred to, all of which are violated by

making said tax applicable to said transfer or to any transfer made before the passage of said act.

XVI.

That the original complaint was filed herein by plaintiffs against defendant on the 21st day of January, 1918, and the summons therein was served on the defendant on the 1st day of February, 1919, and the defendant appeared herein on the 12th day of February, 1919.

Wherefore, plaintiffs pray judgment against the said defendant for the recovery of said sum of $4,545.50, together with interest thereon from the 19th day of November, 1918.

ISAAC FROHMAN,
HELLER, POWERS & EHRMAN,
Attorneys for Plaintiffs.

EDWARD F. TREADWELL,
Of Counsel.

15 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Albert Lachman, being first duly sworn, deposes and says: that he is one of the executors of the estate of Henriette S. Lachman, deceased; that he has read the foregoing amended complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated on information or belief, and as to such matters he believes it to be true.

ALBERT LACHMAN.

Subscribed and sworn to before me this 18th day of August, 1919.
[SEAL.] W. H. PYBURN,
Notary Public in and for the City and County of San Francisco, State of California.

Received a copy of the within this 18th day of August 1919.
ANNETTE ABBOTT ADAMS,
Attorney for Defendants.

Endorsed: Filed Aug. 18, 1919. W. B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

16 (Title of Court and Cause.)

Demurrer to Amended Complaint.

Now comes the defendant above named and demurring to the amended complaint of plaintiff on file herein for ground of demurrer shows:

I.

That said amended complaint does not state facts sufficient to constitute a cause of action against said defendant.

Wherefore, said defendant prays that he be hence dismissed with judgment for his costs incurred herein.

ANNETTE ABBOTT ADAMS,
United States Attorney.
FRANK M. SILVA,
Asst. United States Attorney,
Attorneys for Defendant.

Received a copy of the within this 27th day of August, 1919.
EDWARD F. TREADWELL.

Endorsed: Filed Aug. 27, 1919. W. B. Maling, clerk, by J. A. Schaertzer, deputy clerk.

17 At a Stated Term, to-wit, the November Term, A. D. 1920, of the Southern Division of the United States District Court for the Northern District of California, Section Division. Held at the Court-room in the City and County of San Francisco, on Thursday, the 6th Day of January, in the Year of our Lord One Thousand Nine Hundred and Twenty-one.

Present: The Honorable William H. Hunt, Circuit Judge.

No. 16220.

UNION TRUST CO. OF S. F. ET AL.

vs.

JUSTUS S. WARDELL, Collector, etc.

(Order Sustaining Demurrer.)

Ordered that the memorandum opinion of Honorable Frank H. Rudkin, District Judge, herein, be filed, and that in accordance with said opinion the defendant's demurrer to amended complaint be and the same is hereby sustained.

18 (Title of Court and Cause.)

Judgment of Dismissal.

It appearing to the Court that plaintiffs have failed to amend their amended complaint within the time allowed by law after the sustaining of defendant's demurrer to the amended complaint; and the

Court having, upon motion of E. M. Leonard, Assistant United States Attorney, ordered that this cause be dismissed and that judgment be entered herein accordingly:

Now therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that plaintiffs take nothing by this action and that defendant go hereof without day.

Judgment entered January 13, 1921.

WALTER B. MALING,
Clerk.

19 In the United States District Court for the Northern District of California, Southern Division, Second Division.

No. 16220.

Union Trust Company of San Francisco (a Corporation) and Albert Lachman, as Executors of the Last Will and Testament of Henriette S. Lachman, Deceased, Plaintiffs,

vs.

Justus S. Wardell, United States Collector of Internal Revenue for the First District of California, Defendant.

Notice of Motion for Substitution, etc.

To the Defendant in the above-entitled action to Messrs Frank M. Silva and D. M. Kelleher, his attorneys:

You and each of you will please take notice that on Monday, the 7th day of February, 1921, at the hour of ten o'clock a. m., or as soon thereafter as counsel can be heard at the courtroom of the above entitled court, the plaintiffs in the above entitled action will move said court for an order substituting John L. Flynn, United States Collector of Internal Revenue for the First Distrct of California, as defendant in the place and stead of the defendant Justus S. Wardell, United States Collector of Internal Revenue for the First District of California, in so far as the said action is against the said Justus S. Wardell in his official capacity, and permitting the said action to also be continued and prosecuted against the said
20 Justus S. Wardell, United States Collector of Internal Revenue for the First District of California, so far as the said *against* is against him individually.

The said motion will be made upon the ground that since the commencement of the said action the said Justus S. Wardell has resigned as United States Collector of Internal Revenue for the First District of California, and the said John L. Flynn has since been appointed and is now the duly appointed, qualified and acting United States Collector of Internal Revenue for the First District of California, and that so far as the said action is against the said Justus S. Wardell

in his official capacity it is a proper case for the substitution of his sucessor, and so far as the said action is against the said Justus S. Wardell in his individual capacity it is proper that the same should be continued and prosecuted against him individually.

Dated February 2nd, 1921.

ISAAC FROHMAN,
HELLER, POWERS & EHRMAN,
Attorneys for Plaintiffs.

GARRET W. McENERNEY,
EDWARD F. TREADWELL,
Of Counsel for Plaintiffs.

21 Received a copy of the within notice of motion for substitution, etc., this 3rd day of February, 1921.

FRANK M. SILVA,
United States Attorney,
Attorney for Defendant.
E. M. LEONARD,
Asst. U. S. Atty.;
D. J. KELLEHER,
Of Counsel for Defendant.

Endorsed: Filed Feb. 3, 1921. W. B. Maling, clerk, by J. A. Schaertzer, deputy clerk.

22 In the United States District Court for the Northern District of California, Southern Division, Second Division.

No. 16220.

Union Trust Company of San Francisco (a Corporation and Albert Lachman, as Executors of the Last Will and Testament of Henriette S. Lachman, Deceased, Plaintiffs,

vs.

Justus S. Wardell, United States Collector of Internal Revenue for the First District of California, Defendant.

(Order Substituting John L. Flynn as Collector, etc.)

In the above entitled action it appearing to the court that the above entitled action having been brought against Justus S. Wardell, United States Collector of Internal Revenue for the First District of California, and the said Justus S. Wardell having thereafter resigned as such collector and John L. Flynn having been duly appointed United States Collector of Internal Revenue for the First District of California to succeed the said Justus S. Wardell, and he having duly qualified, and it being uncertain as to whether this

is a proper case for the substitution of the said successor to the said defendant, Justus S. Wardell, or whether the said action should proceed against the said defendant, Justus S. Wardell, and it appearing to the court on motion of the plaintiffs that it is necessary for the survivor thereof to obtain a settlement of the questions involved;

Now, therefore, it is by the court ordered that so far as
23 the said action is against the said defendant, Justus S. Wardell, in his official capacity, the same may be maintained against his successor in office, to-wit: John L. Flynn, United States Collector of Internal Revenue for the First District of California, and that so far as the same is against said defendant, Justus S. Wardell, personally, the same may be continued against him, and that the said action may be hereafter maintained and prosecuted against the said Justus S. Wardell, United States Collector of Internal Revenue for the First District of California, and said John L. Flynn, United States Collector of Internal Revenue for the First District of California, without further pleadings or process.

Dated February 7th, 1921.

FRANK H. RUDKIN,
District Judge.

Endorsed: Filed Feb-7 1921. W. B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

24 In the United States District Court for the Northern District of California, Southern Division, Second Division.

No. 16220.

UNION TRUST COMPANY OF SAN FRANCISCO (a Corporation and Albert Lachman, as Executors of the Last Will and Testament of Henriette S. Lachman, Deceased, Plaintiffs,

vs.

JUSTUS S. WARDELL, United States Collector of Internal Revenue for the First District of California, and John L. Flynn, United States Collector of Internal Revenue for the First District of California, Defendants.

Appearance of John L. Flynn, United States Collector of Internal Revenue for the First District of California.

Comes now John L. Flynn, United States Collector of Internal Revenue for the First District of California, substituted as defendant in the above entitled action in the place of Justus S. Wardell, United States Collector of Internal Revenue for the First District of California, insofar as the above entitled action is against the said Justus S. Wardell in his official capacity by an order of the above entitled court given, made and filed on the 7th day of February,

1621, and hereby appears in said action as such defendant by the undersigned, his attorneys.

FRANK M. SILVA,
E. M. L.
United States Attorney,
Attorney for Defendants;
D. M. KELLEHER,
Of Counsel for Defendants.

Endorsed: Filed Feb. 9 1921. W. M. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

25 In the District Court of the United States for the Northern District of California, Southern Division.

No. 16,220.

Union Trust Company of San Francisco (a Corporation and Albert Lachman, as Executor of the Last Will and Testament of Henriette S. Lachman, Deceased, Plaintiffs,

vs.

Justus S. Wardell, United States Collector of Internal Revenue for the First District of California, Defendant.

Memorandum. Opinion.

Heller, Powers & Ehrman, Isaac Frohman, Edward F. Treadwell, John W. Preston and Garret W. McEnerney, Attorneys for Plaintiffs.

Annette Abbott Adams, United States Attorney, Chas. W. Thomas, Jr., Assistant United States Attorney, and D. M. Kelleher, Attorneys for Defendant.

Rudkin, *District Judge:*

Section 201 of the Act of September 8, 1916 (39 Stat. 777), imposes a tax upon the transfer of the net estate of every decedent dying after the passange of the act, whether a resident or nonresident of the United States.

Section 202 provides:

"That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated: * * *

"(*b*) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth."

The value of the net estate is ascertained by making certain authorized deductions from the value of the gross estate.

On the 31st day of May, 1901, Henriette S. Lachman executed a declaration of trust under the terms of which she assigned
26 7,475 shares of the capital stock of the S. & H. Lachman
estate, of which she was the owner, to her sons Albert Lachman and Henry Lachman, as trustees, to pay the income from the stock to her during her life, and upon her death to deliver the stock to certain relatives named in the trust deed. The grantor in the trust deed died on the 14th day of November, 1916, and the present suit was thereafter brought by her executors to recover the sum of \$4,545.50 paid as tax on the above transfer, under protest.

Counsel for plaintiffs contend that the act should not be so construed as to include transfers made prior to its passage, and that if it so construed the act is unconstitutional and void. Both of these questions were determined adversely to the plaintiffs by the Circuit Court of Appeals for the Eighth Circuit in Schwab, Executor, v. Doyle, not yet reported. In that case the transfer was made in contemplation of death, whereas in the present case the transfer was intended to take effect in possession or enjoyment at or after death, but manifestly the same rule of construction will apply to both provisions, and the same rule of constitutional validity. I entertain no doubt that the act was intended to operate retrospectively, and a contrary construction could only be justified on the principle that such a construction would render the act unconstitutional. On the question of constitutionality the decision of an appellate court should certainly raise a doubt as to the invalidity of the act in the mind of a trial court, and without further discussion the demurrer will be sustained.

Let an order be entered accordingly.

Endorsed: Filed January 6, 1921. Walter B. Maling, Clerk.

27 In the United States District Court for the Northern District of California, Southern Division, Second Division.

No. 16220.

UNION TRUST COMPANY OF SAN FRANCISCO (a Corporation and Albert Lachman, as Executors of the Last Will and Testament of Henriette S. Lachman, Deceased, Plaintiffs,

vs.

JUSTUS S. WARDELL, United States Collector of Internal Revenue for the First District of California, and John L. Flynn, United States Collector of Internal Revenue for the First District of California, Defendants.

To the Honorable the Judges of the United States District Court for the Northern District of California:

Now come the above named plaintiffs and file this, their petition for writ of error in the above entitled cause, and respectfully show:

I.

That on the 13th day of January, 1921, the said court made and entered its judgment in said cause in favor of defendant and against the plaintiffs.

II.

That the said case is a case that involves the construction of the Constitution of the United States.

III.

That the said case is a case that involves the application of the Constitution of the United States.

28 IV.

That the said case is a case in which the constitutionality of a law of the United States is drawn in question.

V.

That said case involves the constitutionality of the Federal Estate Tax Act, approved September 8, 1916, when applied retroactively to a transfer made before the passage of the said act and when applied to property rights and estates which became vested by transfer prior to the time that said act became effective, and when applied to the coming into possession of estates in remainder which had become fully vested in interest before said act became effective.

VI.

That this is a proper case to be reexamined, reversed or affirmed by the Supreme Court of the United States upon a writ of error, within the meaning of section 238 of the Judicial Code of the United States.

VII.

That in said judgment certain errors were committed to the prejudice of the plaintiffs, all of which will appear in detail from the assignment of errors which is filed with this petition.

Wherefore, plaintiffs pray that a writ of error in their behalf issue out of the Supreme Court of the United States directed to the United States District Court for the Northern District of California, and that said plaintiffs be allowed to prosecute the same in said Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in said cause, duly authenticated, may be forwarded to the

Supreme Court of the United States, and that an order be made fixing the amount of the supersedeas bond which said plain-
29 tiffs shall give and furnish on said writ of error, and that upon the giving of said bond all further proceedings be suspended, stayed and superseded until the determination of said writ of error by the Supreme Court of the United States.

ISAAC FROHMAN,
HELLER, POWERS & EHRMAN,
Attorneys for Plaintiffs.

GARRET W. McENERNEY,
EDWARD F. TREADWELL,
Of Counsel for Plaintiffs.

Endorsed: Filed Feb. 15, 1921. W. B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

30 In the United States District Court for the Northern District of California, Southern Division, Second Division.

No. 16220.

UNION TRUST COMPANY OF SAN FRANCISCO (a Corporation) and Albert Lachman, as Executors of the Last Will and Testament of Henriette S. Lachman, Deceased, Plaintiffs,

vs.

JUSTUS S. WARDELL, United States Collector of Internal Revenue for the First District of California, and John L. Flynn, United States Collector of Internal Revenue for the First District of California, Defendants.

Assignment of Errors.

Now come the plaintiffs in the above entitled cause, and, in connection with their petition for writ of error in the above entitled cause, make the following assignment of errors which they aver occurred in said cause, and upon which they will urge their writ of error in the above entitled cause, to-wit:

I.

The court erred in holding that the Federal Estate Tax Act, approved September 8, 1916, applies to the transfer alleged in the complaint, or applies to a transfer made prior to the passage of the said act, or applies to trusts in property created prior to the date said act became effective, or applies to property rights or estates which became vested by transfer before said act became effective.

31

II.

The court erred in holding that the said act imposes a tax on the coming into possession of estates in remainder which were fully vested in interest prior to the passage of the said act.

III.

The court erred in holding that the said act should be construed to be retroactive, or to apply to any such transfer or to any such prior vested property rights or estates.

IV.

The court erred in holding that if the said act should be construed to be retroactive, or to be intended to be applied to a transfer made before the passage of the said act, or to property rights and estates which became vested by transfer prior to the time that the said act became effective, the said act would not be in violation of the Constitution of the United States.

V.

The court erred in holding that if the said act were so construed and applied it would not be in violation of the Constitution of the United States, in that the same would take the property of the said trustees and of the beneficiaries under the said declaration of trust without due process of law, in violation of the fifth amendment to the Constitution of the United States.

VI.

The court erred in holding that if the said act should be so construed and applied it would not be in violation of the Constitution of the United States, in that the same would take private property, to-wit: the property of the said trustees and the said beneficiaries under the said declaration of trust, for a public use without
32 just compensation, in violation of the fifth amendment to the Constitution of the United States.

VII.

The court erred in holding that if the said act should be so construed and applied it would not be in violation of the Constitution of the United States, in that the tax so imposed by the said act would not be a transfer tax or an indirect tax but would be a direct tax upon the property and the rights of property of the said trustees and beneficiaries under the said declaration of trust, and as a direct tax upon the said property and rights the same would be in violation of article I, section 9, subdivision 4, of the Constitution of the United States.

because not laid in proportion to census or enumeration as therein provided.

VIII.

The court erred in holding that if the said act should be so construed and applied it would not be in violation of the Constitution of the United States, in that the tax so imposed produces such gross and patent inequality as to be entirely beyond the scope of the taxing power of Congress, and to transcend the legitimate exercise of the functions of government.

IX.

The court erred in holding that in making the said transfer on the said 31st day of May, 1901, and in executing the said declaration of trust, dated May 31st, 1901, the said decedent made a transfer of or created a trust with respect to any property in contemplation of or intended to take effect in possession or enjoyment at or after her death within the meaning of said Act of Congress.

X.

33 The court erred in holding that the said properties so transferred on the 31st day of May, 1901, did not become vested property rights of the said trustees and beneficiaries upon the execution of said declaration of trust on the 31st day of May, 1901, and long prior to the passage of the said act.

XI.

The court erred in holding that the said shares of stock so transferred on the 31st day of May, 1901, were a part of the gross estate of the said Henriette S. Lachman, within the meaning of the said act, and in holding that the same were subject to taxes thereunder.

XII.

The court erred in sustaining the demurrer of the defendant to the plaintiffs' amended complaint.

XIII.

The court erred in rendering judgment in favor of defendant and against the plaintiffs.

Wherefore, said plaintiffs pray that the judgment of said court be reversed.

ISAAC FROHMAN,
HELLER, POWERS & EHRMAN,
Attorneys for Plaintiffs.

GARRET W. McENERNEY,
EDWARD F. TREADWELL,
Of Counsel for Plaintiffs.

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Endorsed: Filed Feb. 15, 1921. W. B. Maling, clerk, by J. A. Schaertzer, deputy clerk.

34 In the United States District Court for the Northern District of California, Southern Division, Second Division.

No. 16220.

UNION TRUST COMPANY OF SAN FRANCISCO (a Corporation) and Albert Lachman, as Executors of the Last Will and Testament of Henriette S. Lachman, Deceased, Plaintiffs,

vs.

JUSTUS S. WARDELL, United States Collector of Internal Revenue for the First District of California, and John L. Flynn, United States Collector of Internal Revenue for the First District of California, Defendants.

Order Allowing Writ of Error and Fixing Amount of Supersedeas Bond.

On this 15th day of February, 1921, came the plaintiffs by their attorneys, and filed herein and presented their petition praying for the allowance of a writ of error and an assignment of errors intended to be urged by them, and praying also that a transcript of the record, proceedings and papers, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

And it appearing that on the 15th day of January, 1921, the final judgment was entered in this cause in favor of defendant and against the plaintiffs, and that the said case is a case that involves the construction of the Constitution of the United States, and is a case that involves the application of the Constitution of the United States, and is a case in which the constitutionality of a law of the United

35 States is drawn in question, and is a case in which the constitutionality of the Federal Estate Tax Act of September 8, 1916, when retroactively applied to a transfer made before the passage of said act and when applied to property rights and estates which became vested by transfer prior to the time that said act became effective, and when applied to the coming into possession of estates in remainder which had become fully vested in interest before said act became effective, is drawn in question, and that said case is a proper case to be re-examined, reversed or affirmed by the Supreme Court of the United States upon a writ of error, within the meaning of section 238 of the Judicial Code of the United States.

In consideration whereof, it is hereby ordered that a writ of error, as prayed for in said petition, be allowed and that the amount of the supersedeas bond to be given by the plaintiff upon said writ of error be, and the same is hereby, fixed at the sum of five hundred ($500), and that upon the giving of said bond all further proceedings in said

cause be suspended, stayed and superseded pending the determination of said writ of error by the Supreme Court of the United States.

Dated this 15th day of February, 1921.

FRANK H. RUDKIN,
District Judge.

Endorsed: Filed Feb. 15, 1921. W. B. Maling, clerk, by J. A. Schaertzer, deputy clerk.

36 In the United States District Court for the Northern District of California, Southern Division, Second Division.

No. 16220.

UNION TRUST COMPANY OF SAN FRANCISCO (a Corporation) and Albert Lachman, as Executors of the Last Will and Testament of Henriette S. Lachman, Deceased, Plaintiffs,

vs.

JUSTUS S. WARDELL, United States Collector of Internal Revenue for the First District of California, and John L. Flynn, United States Collector of Internal Revenue for the First District of California, Defendants.

Bond on Writ of Error.

Know all men by these presents, that Union Trust Company of San Francisco (a corporation) and Albert Lachman, as executors of the last will and testament of Henriette S. Lachman, deceased, as principals, and W. H. Trump and W. S. Mitchell, as sureties, are held and firmly bound unto Justus S. Wardell, United States Collector of Internal Revenue for the First District of California, and John L. Flynn, United States Collector of Internal Revenue for the First District of California, in the full and just sum of five hundred dollars ($500), to be paid to the said Justus S. Wardell, United States Collector of Internal Revenue for the First District of California, and John L. Flynn, United States Collector of Internal Revenue for the First District of California, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents:

37 Sealed with our seals and dated this 14th day of February in the year of our Lord, one thousand nine hundred and twenty-one.

Whereas, lately in the District Court of the United States for the Northern District of California, in a suit pending in said court between Union Trust Company of San Francisco (a corporation) and Albert Lachman, as executors of the last will and testament of Henriette S. Lachman, deceased, plaintiffs, and Justus S. Wardell, United States Collector of Internal Revenue for the First District of

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California, defendant, a judgment was rendered against the said plaintiffs, and said plaintiffs have sued out a writ of error from the Supreme Court of the United States to the District Court of the United States for the Northern District of California to reverse the judgment in the aforesaid suit, and a citation directed to the said defendants citing and admonishing them to be and appear at a session of the Supreme Court of the United States to be held in the City of Washington, District of Columbia, within sixty days after the service of said citation.

Now, the condition of the above obligation is such, that if the said plaintiffs shall prosecute said writ of error to effect, and answer all damages and costs if they shall fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

In witness whereof, the parties herein named as principals and sureties have caused these presents to be executed this 14th day of February, 1921.

[SEAL.]

UNION TRUST COMPANY OF SAN FRANCISCO,
By L. E. GREENE, *Vice President,*
By F. H. ALT, *Secretary,*
As Executors of the Last Will and Testament of Henriette S. Lachman, Deceased;
ALBERT LACHMAN, *As Principals.*
W. H. TRUMP.
W. S. MITCHELL,
As Sureties.

38 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

W. H. Trump and W. S. Mitchell being first duly sworn, each for himself deposes and says: that he is a resident and householder within the State of California, and is worth the sum specified in the foregoing undertaking, over and above all of his just debts and liabilities, exclusive of property exempt from execution.

W. H. TRUMP.
W. S. MITCHELL.

Subscribed and sworn to before me this 14th day of February, 1921.

[SEAL.]

JAMES MASON,
Notary Public in and for the City and County of San Francisco, State of California.

The foregoing bond is hereby approved this 15th day of February, 1921.

FRANK H. RUDKIN,
District Judge.

Endorsed: Filed Feb. 15, 1921. W. B. Maling, clerk, by J. A. Schaertzer, deputy clerk.

39 In the United States District Court for the Northern District of California, Southern Division, Second Division.

No. 16220.

UNION TRUST COMPANY OF SAN FRANCISCO (a Corporation), and Albert Lachman, as Executors of the Last Will and Testament of Henriette S. Lachman, Deceased, Plaintiffs,

vs.

JUTUS S. WARDELL, United States Collector of Internal Revenue for the First District of California, and John L. Flynn, United States Collector of Internal Revenue for the First District of California, Defendants.

Præcipe for Record on Writ of Error.

To the clerk of the above entitled court:

You are hereby requested to forthwith prepare transcript of the record on writ of error in the above entitled cause, and that you include in said transcript the following documents, to wit:

1. Amended complaint.

2. Demurrer to amended complaint.

3. Order sustaining demurrer.

4. Judgment.

5. Notice of motion for substitution of John L. Flynn, United States Collector of Internal Revenue for the First District of California.

6. Order of substitution of John L. Flynn, United States Collector of Internal Revenue for the First District of California.

7. Appearance of John L. Flynn, United States Collector of Internal Revenue for the First District of California.

8. Petition for writ of error.

9. Assignment of errors.

10. Bond on writ of error.

11. Order allowing writ of error and fixing amount of supersedeas bond.

12. Writ of error.

13. Citation.

Dated: February 16th, 1921.

ISAAC FROHMAN,
HELLER, POWERS & EHRMAN,
Attorneys for Plaintiffs.

EDWARD F. TREADWELL,
GARRET W. McENERNEY,
Of Counsel for Plaintiffs.

Endorsed: Filed Feb. 17, 1921. W. B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

40 In the Southern Division of the United States District Court in and for the Northern District of California, Second Division.

No. 16220.

UNION TRUST COMPANY OF SAN FRANCISCO, a Corporation, et al., Plaintiffs,

vs.

JUSTUS S. WARDELL, United States Collector of Internal Revenue for the First District of California, and John L. Flynn, United States Collector of Internal Revenue for the First District of California, Defendants.

Clerk's Certificate to Record on Writ of Error.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing thirty-nine (39) pages, numbered from 1 to 39, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the præcipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said Court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $17.00; that said amount was paid by the plaintiffs, and that the original writ of error and citation issued in said cause are hereto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court this 21st day of February, A. D. 1921.

[Seal of the U. S. District Court, Northern Dist. of California.]

WALTER B. MALING,
Clerk United States District Court for the Northern District of California.

41 In the United States District Court for the Northern District of California, Southern Division, Second Division.

No. 16220.

UNION TRUST COMPANY OF SAN FRANCISCO (a Corporation), and Albert Lachman, as Executors of the Last Will and Testament of Henriette S. Lachman, Deceased, Plaintiffs,

vs.

JUSTUS S. WARDELL, United States Collector of Internal Revenue for the First District of California, and John L. Flynn, United States Collector of Internal Revenue for the First District of California, Defendants.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the District Court of the United States for the Northern District of California, Greeting:

Because in the record and proceedings, as well as in the rendition of the judgment of a plea which is in the District Court of the United States for the Northern District of California, before you, or some of you, between Union Trust Company of San Francisco (a corporation) and Albert Lachman, as executors of the last will and testament of Henriette S. Lachman, deceased, plaintiffs, and Justus S. Wardell, United States Collector of Internal Revenue for the First District of California, and John L. Flynn, United States Collector of
42 Internal Revenue for the First District of California, defendants, being a case that involves the construction and application of the Constitution of the United States, and being a case in which the constitutionality of a law of the United States is drawn in question, a manifest error hath happened to the great damage of plaintiffs, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the Supreme Court at Washington, within sixty days from the date hereof that the record and proceedings aforesaid being inspected, the said supreme court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of United States, should be done.

Witness, the Hon. Edward D. White, Chief Justice of the United States, the 15th day of February, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal of the U. S. District Court, Northern Dist. of California.]

WALTER B. MALING,
Clerk of the United States District Court for the Northern District of California.
By J. A. SCHAERTZER,
Deputy Clerk.

Allowed by:
FRANK H. RUDKIN,
United States District Judge.

13 I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, Southern Division, Second Division, do hereby certify that plaintiffs in error in the within entitled action have on the 17th day of February, 1921, deposited with me one copy of the within Writ of Error for each of the defendants in said action.

Witness my hand and the seal of said court this 17th day of February, 1921.

[Seal of the U. S. District Court, Northern Dist. of California.]

WALTER B. MALING,
Clerk of the United States District Court for the Northern District of California.
By J. A. SCHAERTZER,
Deputy Clerk.

13½ [Endorsed:] No. 16220. In the United States Court for the Northern District of California, Southern Division, Second Division. Union Trust Company of San Francisco (a corporation), et al., Plaintiffs, vs. Justus S. Wardell, etc., et al., Defendants. Writ of Error. Filed Feb. 17, 1921. W. B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk. Edward F. Treadwell, Attorney-at-Law, 1323 Merchants Exchange Building, San Francisco, California.

14 *Return to Writ of Error.*

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under

the seal of our said Court, to the Supreme Court of the United States, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal of the U. S. District Court. Northern Dist. of California.]

WALTER B. MALING,
Clerk United States District Court,
Northern District of California.

45 In the United States District Court for the Northern District of California, Southern Division, Second Division.

No. 16220.

UNION TRUST COMPANY OF SAN FRANCISCO (a Corporation), and Albert Lachman, as Executors of the Last Will and Testament of Henriette S. Lachman, Deceased, Plaintiffs,

vs.

JUSTUS S. WARDELL, United States Collector of Internal Revenue for the First District of California, and John L. Flynn, United States Collector of Internal Revenue for the First District of California, Defendants.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to Justus S. Wardell, United States Collector of Internal Revenue for the First District of California, and John L. Flynn, United States Collector of Internal Revenue for the First District of California, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be held at the City of Washington, District of Columbia, on the 15th day of April, 1921, pursuant to a writ of error on file in the clerk's office of the District Court of the United States for the Northern District of California, in that certain action, No. 16220, wherein Union Trust Company of San Francisco (a corporation) and Albert Lachman, as executors of the last will and testament of Henriette S. Lach-
46 man, deceased, are plaintiffs in error, and you, Justus S. Wardell, United States Collector of Internal Revenue for the First District of California, and John L. Flynn, United States Collector of Internal Revenue for the First District of California, are defendants in error, to show cause, if any there be, why the judgment given, made and entered against the said plaintiffs in error in said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Judges of the District Court of the United States for the Northern District of California, this 15th day of February, in the year of our Lord one thousand nine hundred and twenty-one.

FRANK H. RUDKIN,
District Judge.

Attest:

[Seal of the U. S. District Court, Northern Dist. of California.]

WALTER B. MALING,
Clerk of the United States District Court for the Northern District of California.
By J. A. SCHAERTZER,
Deputy Clerk.

47 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Forrest A. Cobb, being first duly sworn, deposes and says: That he is a citizen of the United States and over the age of twenty-one years, and not a party to the within entitled action; that on the 17th day of February, 1921, he personally served the within citation upon Frank M. Silva, United States District Attorney for the Northern District of California, by exhibiting the within original citation to the said Frank M. Silva, as such United States District Attorney, and by delivering to him a copy of the same; that the said Frank M. Silva as such United States District Attorney for the Northern District of California is the attorney of record in the within entitled action for each of the defendants named therein.

FORREST A. COBB.

Subscribed and sworn to before me this 17th day of February, 1921.

[Seal of James Mason, Notary Public, City and County of San Francisco, Cal.]

JAMES MASON,
Notary Public in and for the City and County of San Francisco, State of California.

48 [Endorsed.] No. 16220. In the United States District Court for the Northern District of California, Southern Division, Second Division. Union Trust Company of San Francisco (a Corporation), et al., Plaintiffs, vs. Justus S. Wardell, etc., et al., Defendants. Citation. Filed Feb. 17, 1921. W. B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk. Edward F. Treadwell, Attorney-at-law, 1323 Merchants Exchange Building, San Francisco, California.

Endorsed on cover: File No. 28,119. N. California D. C., U. S. Term No. 762. Union Trust Company of San Francisco and Albert Lachman, as executors of the last will and testament of Henriette S. Lachman, deceased, plaintiffs in error, vs. Justus S. Wardell, United States Collector of Internal Revenue for the First District of California, and John L. Flynn, United States Collector of Internal Revenue for the First District of California. Filed February 28th, 1921. File No. 28,119.

(3871)

No. 236

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1921

UNION TRUST COMPANY OF SAN FRANCISCO and ALBERT LACHMAN, as Executors of the Last Will and Testament of Henriette S. Lachman, Deceased,

Plaintiffs in Error,

vs.

JUSTUS S. WARDELL, United States Collector of Internal Revenue for the First District of California, and JOHN L. FLYNN, United States Collector of Internal Revenue for the First District of California,

Defendants in Error.

MOTION TO ADVANCE CAUSE.

To the Honorable, the Supreme Court of the United States:

The plaintiffs in error in the above entitled cause respectfully move the court to advance said cause for

hearing so that it will be heard together with the cases of *Shwab*, plaintiff in error, v. *Doyle*, defendant in error, October term, 1921, No. 200; and *Levy* et al., plaintiffs in error, v. *Wardell* et al., defendants in error, October term, 1921, No. 303.

This motion is made for the reason that all three of said cases involve the taxability under the Federal Estate Tax Act of September 8, 1916, of transfers *inter vivos* made before the passage of said act:

[1] *Shwab* v. *Doyle* involves a transfer which took effect in possession and enjoyment before the passage of said act, but which is alleged to have been made in contemplation of death, and to be taxable under said act;

[2] *Union Trust Company* v. *Wardell* involves a transfer made before the passage of said act, but which is alleged to have taken effect in possession and enjoyment after the passage thereof, and to be taxable under said act; and

[3] *Levy* v. *Wardell* involves a transfer of the decedent's entire estate made before the passage of said act, but which is alleged to have taken effect in possession and enjoyment after the passage thereof, and to be taxable under said act, although the grantor left no estate at the time of her death.

It is believed that it will be to the convenience and best interests of all the parties, as well as to the con-

venience of the court, if all three of said cases are heard by the court at the same time.

Respectfully submitted,

E. S. Heller,

Isaac Frohman,

Edward F. Treadwell,

Garret W. McEnerney,

Attorneys for Plaintiffs in Error.

To the defendants in error in the above entitled cause and Harry M. Daugherty, Attorney-General of the United States, Frank M. Silva, United States Attorney, E. M. Leonard, Assistant United States Attorney, and D. M. Kelleher, their attorneys:

You and each of you will please take notice that the foregoing motion to advance will be submitted to the Supreme Court of the United States at Washington, D. C., on the third day of October, 1921, or as soon thereafter as counsel can be heard.

E. S. Heller,

Isaac Frohman,

Edward F. Treadwell,

Garret W. McEnerney,

Attorneys for Plaintiffs in Error.

Received a copy of the within this .... day of September, 1921.

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Attorneys for Defendants in Error.

Supreme Court of the United States

OCTOBER TERM, 1921

No. 236

UNION TRUST COMPANY OF SAN FRANCISCO and ALBERT LACHMAN, AS EXECUTORS OF HENRIETTE S. LACHMAN, DECEASED,
Plaintiffs-in-error,

v.

JUSTUS S. WARDELL, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF CALIFORNIA, ET AL.,
Defendants-in-error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF ON BEHALF OF THE PLAINTIFFS-IN-ERROR.

WILLIAM D. GUTHRIE,
GARRET W. McENERNEY,
E. S. HELLER,
ISAAC FROHMAN,
BERNARD HERSHKOPF,
Of counsel for plaintiffs-in-error

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921, No. 236.

UNION TRUST COMPANY OF SAN FRANCISCO and ALBERT LACHMAN, as executors of Henriette S. Lachman, deceased,

Plaintiffs-in-error,

v.

JUSTUS S. WARDELL, United States Collector of Internal Revenue for the First District of California, et al.,

Defendants-in-error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF ON BEHALF OF THE PLAINTIFFS-IN-ERROR.

The present writ of error brings before the court for review a judgment in favor of the defendant Collector of Internal Revenue rendered upon the failure of the plaintiffs to plead over after the court below had sustained a demurrer to the amended complaint in an action to recover a tax alleged to have been illegally and unconstitutionally imposed and collected (pp. 1-12). The

tax involved is one purporting to be levied under the authority of the Federal Estate Tax Law of September 8, 1916 (39 Stat. 777), which the plaintiffs contend is not applicable to the case at bar when properly construed, or, if applicable, is unconstitutional because the transfer to which the tax in question relates was irrevocably made and completed in 1901, more than fifteen years prior to the passage of the taxing act. The court below overruled these contentions. Its opinion is reported in 273 Fed. 733, and is printed at pp. 15-6 of the record.

Statement.

In May, 1901, Henriette S. Lachman was the owner of 7,475 shares of the capital stock of the S. & H. Lachman Estate, a California corporation. On May 31st of that year she executed and delivered to her two sons, Albert and Henry, a deed or declaration of trust in respect of this stock (pp. 2-3). By this instrument, she irrevocably transferred to them as trustees the stock in question, upon trust to pay to her the income therefrom for life, and at her death to deliver 2,490 shares of the stock to her son Henry and 2,495 shares to her son Albert, as their respective absolute property. The remaining 2,490 shares she directed the said trustees to hold after her death in further trust for her daughter, Rebecca Metzger, to pay the income therefrom to the said daughter and, upon the death of the latter, to apply the said income for the benefit of the daughter's children until the youngest became of age, when the 2,490 shares were directed to be equally divided

among the then surviving grandchildren (pp. 2-3). The share certificates were thereupon in May, 1901, immediately upon the execution and delivery of the deed of trust, endorsed and delivered to the trustees (p. 3).

The creator of the trust, the trustees and all the *cestui que trustent* were at all the times material in the case at bar residents of the State of California, and the property involved in the trust was within that state and consisted of the stock of a corporation organized under the laws of that state (p. 3). The property rights and interests of the parties herein are, therefore, controlled by the law of California. Under that law, it is indisputable that the execution and delivery of the deed or declaration of trust on May 31, 1901, operated on that day immediately and irrevocably to divest the transferor of all right, title and interest in the 7,475 shares of stock, except to the extent of the equitable life estate reserved by her. The transfer, followed by immediate and unconditional delivery as aforesaid, was complete and perfect in 1901 and beyond the power of Henriette Lachman, the transferor, thereafter to alter or affect in any manner.

By the settled law of California the transfer of 1901 at once vested the following interests, namely:

(1) In Henriette Lachman an equitable life interest, which would terminate and be extinguished upon her death;

(2) In Henry and Albert Lachman, respectively, a vested and indefeasible remainder;

(3) In Rebecca Metzger a vested equitable life estate upon the death of her mother, and

(4) In the children of Rebecca Metzger a vested and defeasible remainder; defeasible, however, not because of any reserved power or authority in Henriette Lachman (for there was none), but only because, being a gift to a class, the gift was subject to open and let in any after-born grandchildren or be divested by the death of some of the grandchildren before the termination of the life estates. *Gray* v. *Union Trust Co.*, 171 Cal. 637, 642; *Estate of Murphy*, 182 Cal. 740, 743; Cal. Civil Code, secs. 693 and 694.

It will be noted that under the local law, which governs the situation, although Henriette Lachman had reserved to herself for life the income arising from the shares of stock transferred, nevertheless, the future interests—the remainders—created by the transfer were all irrevocably vested in the donees on the day the transfer was made, namely, on May 31, 1901.

After the trust had continued for thirteen years, and on July 13, 1914, the daughter of Mrs. Lachman, Rebecca Metzger, died (p. 4). She was survived by three children—Elsa Metzger Davis, Vera Metzger Davis and Samuel Metzger—remaindermen under the deed or declaration of trust, all of whom had been born prior to May 31, 1901, when the trust was created (*id.*). The youngest of these grandchildren, Samuel, attained his majority on September 19, 1916 (*id.*).

About a year after the death of the daughter, Mrs. Metzger, one of the sons, Henry Lachman, died on July 10, 1915 (p. 3). He left a will in which he bequeathed his estate to his mother, and thereupon there was re-vested in her the remainder interest which she had previously

given him in the 2,490 shares of the Lachman Estate stock above referred to (pp. 3-4).

Thereafter on November 14, 1916, Henriette S. Lachman, the donor, died leaving a last will and testament and an estate of about $300,000 (p. 4). Her life interest in the Lachman Estate stock was thus extinguished (*Commonwealth* v. *McCauley's Executors*, 166 Ky. 450, 452), and, as the trust thus came to an end, the surviving trustee, Albert Lachman, distributed the shares, taking 2,495 shares for himself and giving 2,490 to the three grandchildren; and none of these 4,985 shares ever became part of Henriette Lachman's estate (pp. 4-5).

Mrs. Lachman's will was thereafter probated, and a tax under the Federal Estate Tax Law of September 8, 1916, paid in respect of the transfer of all the property which passed at her death under her will (pp. 4, 5). No tax, however, was paid upon the transfer of the 4,985 shares of S. & H. Lachman Estate stock which the testatrix had made in May, 1901, more than fifteen years before, and which she had not owned since then and which belonged to her surviving son, Henry, and her grandchildren (p. 5). Thereupon, the Commissioner of Internal Revenue ruled that the value of these shares at the time of the death of Mrs. Lachman should have been returned as part of her gross estate for purposes of taxation under the Estate Tax Law of September 8, 1916, and assessed against the plaintiffs, the executors of Mrs. Lachman's estate (p. 1), an additional tax in respect thereof to the amount of $4,545.50, which the plaintiffs paid to the defendant Collector of Internal Revenue under protest in due form (pp. 5-8).

The plaintiff executors thereafter appealed to the Commissioner of Internal Revenue for a refund of the tax thus collected, but he denied their application (p. 8), and they thereupon commenced this action to recover the amount paid under protest as aforesaid.

On May 31, 1901, when the transfer in suit was made, there was no law in force in California which imposed any transfer, inheritance, or other tax upon transfers to lineal descendants (such as are the parties here involved), whether or not such transfers had been made in contemplation of death, or whether or not they had been intended to take effect in possession or enjoyment at or after the death of the donor (pp. 8-9). In the case at bar, it is the fact that the transfer of 1901 was not made in contemplation of death, nor with any intent or purpose that it should not take effect at once, and the trustees then took over the shares of stock and entered into the possession thereof (p. 9).

It is the established law of the State of California that, although property may have been transferred in contemplation of death or to take effect in possession or enjoyment at or after death, the transfer, nevertheless, creates vested property rights in the transferee which no subsequent transfer tax law can impair or affect. *Hunt* v. *Wicht*, 174 Cal. 205. It is clear, therefore, that there is not now before the court a case in which the testatrix can in any just sense be charged with having made a transfer in order to evade taxation in any jurisdiction. The decedent's estate has, therefore, been subjected to taxation in respect of property which she ceased to own more than fifteen years before her death and over fifteen years before the taxing act was passed, and has

been so taxed at a rate based upon the value of such property, not at the time when she transferred it or owned it, but at the time of her death, when its value may have been substantially greater. The record, however, does not show the actual value in 1901.

To a complaint alleging in substance the facts above stated (pp. 1-10), the defendant collector interposed a demurrer upon the ground that it did not state a cause of action (pp. 10-11). This demurrer was sustained (p. 11); and the plaintiffs having declined to plead over, the court below gave judgment against them (pp. 11-2). The district judge (p. 16) deemed himself bound by the decision of the Circuit Court of Appeal of the Sixth Circuit in *Shwab* v. *Doyle*, 269 Fed. 321, which is now pending undetermined in this court (October Term, 1921, No. 200).

THE ASSIGNMENTS OF ERROR AND STATEMENT OF THE NATURE OF THE CONTENTIONS OF THE PLAINTIFFS-IN-ERROR.

The assignments of error (pp. 18-20) may be briefly summarized as asserting (1) that the Estate Tax Act of September 8, 1916, properly construed, does not apply to transfers made long prior to its passage, whether such transfers were in contemplation of death, or created future interests to come into possession or enjoyment at or after the transferor's death, and (2) that, if construed to apply to such past transfers, the act would be unconstitutional.

The plaintiffs-in-error do not challenge either the applicability or constitutionality of the act in so far as it is applicable to transfers made subsequent to its enactment. Those questions are no longer open in this

court. *New York Trust Co.* v. *Eisner,* 256 U. S. 345. But the retroactive operation of the law and its validity if it does operate retroactively, are herein called into question. This court has not yet determined these questions.

No principle is more firmly imbedded in our law than that special tax impositions are not to be construed retroactively, nor so as to interfere with consummated acts, antecedent rights, past relations and vested interests, unless the language of the enactment clearly and unambiguously compels such a construction. There is no such language in the statute now before the court. Indeed, Congress saw fit in the act of September 8, 1916, to select and employ language different from that of the act of 1864 which this court had held to be retroactive in effect and meaning. Instead of re-adopting the earlier phraseology, Congress deliberately, and presumably intentionally, adopted taxing formulae long in use in state legislation, which the state courts, upon the fullest and most deliberate consideration and with singular unanimity, had declared prospective only. Moreover, Congress has itself placed upon the statute the prospective construction herein urged, for it subsequently deemed it necessary so to amend the law in and by the act of February 24, 1919, as to make its provisions apply retroactively. Subdivision b of section 202 of the act of September 8, 1916 (39 Stat. 777), which governs the case at bar, and the corresponding subdivision c of section 402 of the amendatory act of February 24, 1919 (40 Stat. 1057), are printed below in parallel columns (the new matter added by the 1919 act being underscored):

Act of September 8, 1916	Act of February 24, 1919
"(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth." . . .	"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth." . . .

Although it is the settled rule that taxing acts are to be interpreted, if doubtful, in favor of the citizen (*Gould* v. *Gould*, 245 U. S. 151, 153; *United States* v. *Field*, 255 U. S. 257, 262), in the case at bar, that principle has thus far been ignored. The decision of the Circuit Court of Appeals by which the trial judge felt himself bound (*Shwab* v. *Doyle*, 269 Fed. 321), declares that although "it is true that if the tax before us is retroactive it might, at least theoretically, affect conveyances made many years before a grantor's death", yet "this consideration", that decision asserts, "is hardly practical" (p. 326). Nevertheless, the transfer now before the court for consideration occurred more than fifteen years before the death of the donor or the enactment of the law, and the Commissioner of Internal Revenue has ruled that the statute is applicable to transfers made "at any time whatsoever

prior to September 8, 1916" (T. D. No. 2,385). While it was suggested in Congress in opposition to this tax that the law would cloud "every title that is transferred *after* the passage of this act" (53 Cong. Rec. 10,729), no one appears to have supposed that it would have any operation in respect of transfers made long *prior* to the passage of the act.

The court below also disregarded the principle of statutory interpretation which requires that, if reasonably possible, a meaning shall be given to a tax law which will not operate unreasonably or oppressively or to impair vested rights or disturb past transactions. A donor who had irrevocably given away an interest in property long before the act of September 8, 1916, and when no one had reason even to contemplate its enactment, may now find it impossible to make suitable, or even any, provision for his wife and children, if the interest thus previously transferred has considerably appreciated in value. Its value at the time of the donor's death, despite the fact that he has not owned or enjoyed it at any time since he parted therewith long before, is the measure of the tax which the donor's estate must now pay. In this manner, the donor is helpless to prevent the depletion of his remaining estate because, in the past, when the law in suit was not even dreamed of, he had given away a piece of land on which ore or oil has since been discovered, and discovered it may be even long after his donee has also parted with it.* Other

* The hardship which may be worked by appreciation in value after the date of gift, will be realized if it be borne in mind how property has risen in value in many parts of the country. Thus, in California, where the case at bar originated, the public records and assessment rolls show the following striking examples:

illustrations will readily occur to the mind where injustice is done by taxing a transfer long after it is an accomplished fact and when the transferor is no longer in a position to make an election in respect thereto and powerless to undo it or re-adjust his or her affairs. It must needs be obvious that such a tax is quite different in character from a transfer tax which operates prospectively only. The transferor then has a choice. He may refrain from making the transfer. He need not exercise the right or privilege of transfer. He has the situation before him, and he must be deemed to realize the cost of his acts. A prospective construction would operate justly; but, it is submitted, a retroactive interpretation would as clearly operate unjustly and oppressively, and should, in consequence, be adopted by a court only when the plainest language constrains to that result. The words of the statute now in question, it is submitted, contain no such language.

In view of the repeated decisions of this court, it should be no longer open to argument that statutes ought not to be construed so as to raise serious doubt of their constitutionality, and that, for the purposes of this canon

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Land	*1918 Valuation*	*1919 Valuation*	*1920 Valuation*	*1921 Valuation*
640 acres known as the Tupman tract (Sec. 36, T. 30 S. R. 24 E.—Kern County, Cal.)..	3,200	3,520	960,000	11,518,855
480 acres known as the Hay tract (W. ½ & W. ½ E. ½, Sec. 36, T. 30 S. R. 23 E.—Kern County, Cal.)..	12,000	12,000	720,000	1,653,110
159 acres known as the Carman tract (Lots 5-8, 11 & 12, Sec. 36, T. 30 S. R. 23 E.—Kern County, Cal.)..	......	39,750	238,500	1,084,965

of statutory interpretation it is not necessary for the court first to rule the unconstitutionality of an act and then to avoid the result by construction. Reasonable doubt, not actual decision of the constitutional question, is all that is required. In the case at bar, as is shown in a subsequent point, this rule is more than met. Thus, the most cursory perusal of the statute will disclose that it is intended to be a transfer tax. It is expressly imposed upon "the *transfer* of the net estate of the decedent" (sec. 201), and references therein to *transfer* as the event or occasion taxed are numerous and clear. It is, therefore, clearly a tax upon the transfer. For the protection accorded by the law to the act of transfer, for the privilege of transfer, the impost is laid. But where the transfer is past, where the privilege or property right of transfer has been exercised, where the act is wholly past, there is no longer any room for an excise tax in respect of the doing of any act or the exercise of any right or privilege. The transferor is not now seeking to do any act or exercise any right or privilege. The transferee is not now seeking or receiving any benefit or property by virtue of a transfer. The transferor now has nothing to transfer, and the transferee now has nothing but present ownership based wholly upon a past transfer.

If this statute be retroactive and, as such, constitutional, then every past transfer of every kind would be liable to taxation; and would be taxable, not only as against any one who had at any time in the past transferred property by sale or gift, but also as against any one who had bought or received it. Vested rights and long closed transactions may be thus disturbed and impaired.

Past profits and benefits may thus be converted into actual losses and disadvantages. The income of sales upon which income or direct taxes have been paid as for net profits or gains, may thus be subsequently transmuted into actual losses by an alleged excise tax for or upon the long past privilege or event of transfer or sale. As nearly all property has heretofore been acquired under some form of transfer, the power to tax past transfers would involve the power to reach all property by the most direct method of taxation. Such taxation, if it be an exercise of the taxing power at all, would have, in substance and practical effect, all the elements and incidents of a direct tax upon ownership as such, and would not be, in its nature and effect, an excise at all.

Many decisions in the state courts have recognized the essential character of a tax upon a past transfer, and have, therefore, held a retroactive transfer tax to be, not a privilege tax, for it clearly falls upon no right or privilege which the state can any longer either give, regulate or withhold, but in practical effect a direct or property tax, which attempts to take property without any consideration or justification and, therefore, without due process of law. These adjudications, quite aside from what they rule concerning limitations upon the taxing power of the several states, rest upon the fundamental conception that a tax upon a past transfer is in reality a tax upon past or present ownership of property as such and, therefore, in no proper sense, an excise at all, but a direct property tax.

I.

As to the provisions of the Estate Tax Act of September 8, 1916, and its legislative history.

The Estate Tax Act of September 8, 1916, which is embraced in sections 200 to 212 of title II of the Revenue Act of 1916 (39 Stat. 777), is printed in full in the appendix to this brief.

By section 201 "a tax . . . equal to the following percentages of the value of the net estate" is "imposed upon the *transfer* of the net estate of every decedent dying after the passage of this Act." The "gross estate", for the purposes of the tax, is then defined in section 202, in the following language:

> "The value of the gross estate of the decedent shall be determined by including the value *at the time of his death* of all property, real or personal, tangible or intangible, wherever situated:
>
> (a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate.
>
> (b) To the extent of any interest therein of which the decedent has at any time made a *transfer*, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a *bona fide* sale for a fair consideration in money or money's worth. . . .
>
> (c) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally be-

> longed to such other person and never to have belonged to the decedent."

It is also declared in subdivision b of section 202, as a rule of evidence upon the subject, that—

> "Any *transfer* of a material part of his [i. e., the decedent's] property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideraton [i. e., 'money or money's worth'], shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title".

Section 203 enumerates the deductions to be made from the "gross estate" in order to arrive at the "net estate". For the purposes in hand it may be sufficient to note that, in the case of resident decedents, these are (1) funeral and administration expenses, claims against the estate, etc., and (2) a specific exemption of $50,000.

The tax is due one year after the decedent's death (sec. 204), and is to be paid by his executor (sec. 207). If not paid, it is the duty of the Collector of Internal Revenue to institute proceedings "to subject the property of the decedent to be sold under the judgment or decree of the court", and thus procure payment of the tax, together with costs and expenses (sec. 208). By section 209 it is provided that—

> "Unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien."

And in the same section it is further provided that—

> "If the decedent makes a *transfer* of, or creates

a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a *bona fide* sale for a fair consideration in money or money's worth) and if *the tax in respect thereto* is not paid when due, the *transferee* or trustee shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such *transfer*, shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such *transferee* or trustee to a *bona fide* purchaser for a fair consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such *transferee* or trustee, except any part sold to a *bona fide* purchaser for a fair consideration in money or money's worth."

The Treasury Department has ruled concerning the tax above summarized, that—

> "This is not an inheritance tax, and the interests of separate beneficiaries and the manner of their taking have no bearing upon the question of liability to tax or the amount of the tax due. *This is a transfer tax*" (Treas. Reg., No. 37, revised to May, 1917, art. IV).

The Ways and Means Committee of the House of Representatives similarly reported that they "deemed it advisable to recommend a federal estate tax upon the *transfer* of the net estate rather than upon the shares passing to heirs and distributees or devisees and legatees" (Report No. 922, 64th Congress, 1st session, p. 5).

It is, therefore, manifest from the above, as well as from the language of the act, that the tax in suit was not intended to be an inheritance tax upon the respective distributive shares which pass at or because of death, as was the tax of 1898 involved in *Knowlton* v. *Moore*, 178 U. S.

41, but an estate transfer tax, as has been pointed out in several state cases (*Matter of Hamlin*, 226 N. Y. 407; *Matter of Sherman*, 179 N. Y. App. Div. 497; *Plunkett* v. *Old Colony Trust Co.*, 124 N. E. 265 [Mass.]). It is also manifest that it is a transfer tax, and, as such alone, was its validity as an excise or indirect tax sustained by this court, so far as the tax operated prospectively, in the recent case of *New York Trust Co.* v. *Eisner*, 256 U. S. 345.

In the act of September 8, 1916, Congress not only varied the language of prior federal tax laws in order to create an estate transfer tax, but it also refrained from using language in prior kindred federal tax laws which was plainly retroactive. Thus, the retroactive provisions of the act of June 30, 1864 (13 Stat. 287), were not adopted or followed. Section 127 of that statute expressly provided that—

> "*Every past or future disposition of real estate*, by will, deed or laws of descent, by reason whereof any person shall become beneficially entitled, in possession or expectancy, to any real estate, or the income thereof, upon the death of any person dying after the passage of this act, shall be deemed to confer on the person entitled by reason of such disposition a 'succession',"

and section 133 thereof imposed a tax "in respect of every such succession as aforesaid" payable by the transferee. That act was plainly retroactive. It expressly applied to "every *past* or future disposition of real property", and hence this court so ruled as a matter of statutory construction in *Wright* v. *Blakeslee*, 101 U. S. 174. But in framing the act of September 8, 1916, Congress avoided the language of the act of 1864, presumably, if not indeed manifestly, because a different purpose, intent and operation were in mind.

The subsequent history of the legislation in suit confirms this view. In 1919 Congress was in search of new sources of revenue wherewith to meet the unprecedented needs of the nation accruing from the World War. It, therefore, revised the act of September 8, 1916, by adding thereto various new matters which extended and broadened the range of taxability thereunder, and to that end it passed the so-called "Revenue Act of 1918," approved by the President on February 24, 1919 (40 Stat. 1057). As above stated, section 402 of this last-mentioned act corresponds with section 202 of the act in suit, and defines the "gross estate" of the decedent for the purposes of the tax. It provides in part that in determining the gross estate of a decedent there shall be included, among other items, "the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated"—

> "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has *at any time* created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (*whether such transfer or trust is made or created before or after the passage of this Act*)," etc.

The new matter then added by Congress is italicized. It was plainly intended to be retroactive, and, it is submitted, was presumably added in order to change the law and to make that taxable which theretofore had not been. As was said in reference to another statute by the Circuit Court of Appeals for the Eighth Circuit in *United States* v. *Bashaw*, 50 Fed. 749, 753-4:

> "The natural presumption is that the phraseology of the statute was changed in order to change

> its meaning. The very fact that the prior act is amended demonstrates the intent to change the pre-existing law, and the presumption must be that it was intended to change the statute in all the particulars touching which we find a material change in the language of the act''.

This court has applied this rule of statutory construction to the very same taxing acts as are now before the court. In the recent case of *United States* v. *Field*, 255 U. S. 257, 264-5, referring to another clause similarly inserted in the act of Congress of September 8, 1916, by the act of February 24, 1919, Mr. Justice Pitney declared that "its insertion indicates that Congress at least was doubtful whether the previous act included property passing by appointment''; and, accordingly, it was then held that the exercise of a power of appointment was not taxable under the earlier law. See also *Smietanka* v. *First Trust & Savings Bank*, Oct. Term, 1921, No. 540, decided February 27, 1922; *Ebersole* v. *McGrath*, 271 Fed. 995, 1001, and *United States* v. *Woodruff*, 175 Fed. 776, 777.

If, therefore, "Congress at least was doubtful whether the previous act'' applied to or taxed past transfers, it would seem to be too plain for argument that such transfers should not be taxed thereunder. It is the settled rule of this court that—

> "Words in a statute ought not to have a retrospective application unless they are so clear, strong, and imperative, that no other meaning can be annexed to them'' (*United States* v. *Heth*, 3 Cranch 399, 413).*

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* See, also, *Reynolds* v. *McArthur*, 2 Pet. 417, 434; *Chew Heong* v. *United States*, 112 U. S. 536, 559; *United States* v. *Burr*, 159 U. S. 78, 82; *United States* v. *American Sugar Refining Co.*, 202 U. S. 563, 577; *Union Pacific R. R. Co.* v. *Snow*, 231 U. S. 204, 213.

And where Congress is itself at least in doubt as to the scope and effect of its own language, it is submitted that no court should hold that this language can, nevertheless, be regarded as "so clear, strong, and imperative, that no other meaning can be annexed to it" than that which would give it a retroactive operation. Certainly any such view would violate the long established canon of statutory interpretation which forbids the extension of taxing acts by implication (and particularly of special taxing acts like that herein in question) to the detriment of the individual. *Gould* v. *Gould*, 245 U. S. 151, 153; *Eidman* v. *Martinez*, 184 U. S. 578, 583; *United States* v. *Field*, 255 U. S. 257, 262; *United States* v. *Wigglesworth*, 2 Story, 369, 373; *Blair* v. *Herold*, 150 Fed. 199, 201. In *Gould* v. *Gould*, the court declared that—

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen."

Consideration of the reasoning and rulings in the courts below will persuasively show that there is reasonable ground for doubting whether the act of September 8, 1916, was ever intended to tax past transfers, and that its words are not "so clear, strong and imperative that no other meaning can be annexed to them" except that which taxes such transfers. The learned judges in the lower courts have, indeed, differed in almost every material particular.

In the case of *Shwab* v. *Doyle*, which is now pending in this court (October Term, 1921, No. 200), the learned district judge ruled that the tax was not in fact retroactive at all, because it taxed only the transfer of the probatable assets of which the decedent died possessed, and that the tax was to be measured, not only by the value of those assets, but also by the value of all the assets which the decedent had in his lifetime transferred in contemplation of death or to take effect in possession or enjoyment at or after death. It will be observed that, under this theory, if one died possessed of no property there would be no tax whatever, notwithstanding the fact that on the day before death the decedent had, in direct contemplation of his impending decease and for the express purpose of evading the tax, transferred away all his property. The language of the statute clearly does not sanction any such outcome.

In *Levy* v. *Wardell*, now pending in this court (October Term, 1921, No. 303), the decedent left no estate whatever at death, but had made gratuitous transfers of property prior to the enactment of the law in suit. Notwithstanding the ruling of the district court in the *Shwab* case, and its clear implication that no tax was imposed in such a case as the *Levy* case, the learned district judge in the *Levy* case, nevertheless, held the contrary and sustained a tax imposed upon the donees.

Shwab v. *Doyle* was subsequently carried to the Circuit Court of Appeals for the Sixth Circuit, where the court rejected the reasoning of the district court, but upheld the tax upon the ground that it was a valid retroactive transfer tax (269 Fed. 321). In the case at bar the court below merely followed this ruling (273 Fed.

733). But in the recent case of *Curley* v. *Tait,* 276 Fed. 840, the learned district judge felt constrained to decline to follow the reasoning and construction of the Circuit Court of Appeals in the *Shwab* case, and wrote in part as follows (at p. 842):

> "They [i. e., the plaintiffs] say that no tax at all was collectable because the transfers here in controversy were all made before the statute was enacted. To this the government has two answers. It says that the statute itself declares that it has reference to a transfer made 'at any time.' These words, however, are susceptible of a reasonable construction, which would limit them to transactions taking place thereafter.
>
> "Congress may well have thought it important to make clear that the length of time before the death at which a transfer took place was not to be a controlling circumstance. The words used were apt to express that intention, and may well have been employed with the limitation, usually implied, that they were not to affect transactions which had already taken place. The rule, of course, is that statutes are not to be given a retroactive construction when by doing so 'antecedent rights are affected or human conduct given a consequence it did not intend.' *Union Pacific Railroad Co.* v. *Snow*, 231 U. S. 204, 213.
>
> "For reasons which will be hereinafter set forth, this statute, if retroactively applied, will, in some instances, cause serious hardship and injustice. The courts have gone to great lengths in construing away language which, in its more natural import, seems to indicate that the Legislature intended the act should affect transactions which had been entered into before its passage. *Union Pacific R. Co.* v. *Laramie Stock Yards Co.*, 231 U. S. 190. If this were a case of first impression, I personally would have no hesitation whatever in holding that the act of 1916 does not affect transfers made before it was passed.

"But the government says, in the second place, that in *Shwab* v. *Doyle*, 269 Fed. 321, the Circuit Court of Appeals for the Sixth Circuit held the act to be retroactive. Diversity of decision is especially unfortunate in the construction of tax statutes, in which uniformity of interpretation and application are so important. Moreover, a court of equal rank would hesitate long before differing with a tribunal so eminent for wisdom and learning as that which has spoken on the subject. Nothing short of the clearest conviction will justify a District Judge in doing so; but there are rare occasions in which he must, because, as the law does not make a decision of a Circuit Court of Appeals binding outside of its own circuit, the responsibility of determination is one from which he cannot escape.

"In *Shwab* v. *Doyle, supra*, the case of *Wright* v. *Blakeslee*, 101 U. S. 174, was cited as authority for holding a similar statute retroactive. The act there construed imposed a tax upon the succession —that is, upon the right to receive—and was levied upon what passed to the heir, devisee, legatee, distributee, or successor, and not upon the estate. *Knowlton* v. *Moore*, 178 U. S. 41, 42, *et seq.* The distinction is neither pedantic nor technical, but, as applied to the matter now in hand, is in the highest degree practical. In *Shwab* v. *Doyle, supra*, it was held that the addition made by the act of 1918 (40 Stat. 1097) of the words 'whether such transfer is made or occurred before or after the passage of this act,' was a legislative construction, rather than an amendment, of the statute now under consideration. The Supreme Court has since taken the opposite view as to other broadening language then first introduced. *U. S.* v. *Field*, 255 U. S. 257.

"The case before the Circuit Court of Appeals was one of a transfer made in contemplation of death. It answered the objection to the practical hardships which a retroactive construction might entail by saying:

" 'It is true that, if the tax before us is retroactive, it might, at least theoretically, affect conveyances made many years before a grantor's death; but this consideration is hardly practical. Congress would, we think, scarcely be impressed with a practical likelihood that a transfer made many years before a grantor's death (say 25 years, to use plaintiff's suggestion) would be judicially found to be made in contemplation of death under the legal definition applicable thereto, and without the aid of the 2-year prima facie provision.'

"Apparently the court's attention was not drawn to some of the consequences which, in a case like the one at bar, would follow from a retroactive construction. The present act, unlike its federal predecessor, is an estate tax, and not a tax upon the right to receive. If the government's contention be sustained, the tax will come, not as in *Wright* v. *Blakeslee, supra,* or in *Cahen* v. *Brewster,* 203 U. S. 543, out of the sum received by the one to whom the taxed property passes, but will be collected from one to whom it does not. Neither the Johns Hopkins Hospital nor the Johns Hopkins University will pay one cent of it. It will all come out of the property going to Grafflin's widow. Would Grafflin have made any of these transfers, had he understood by so doing he would impose a charge upon his wife of upwards of $23,-000? The care with which certain limitations were introduced into each of the agreements would seem to make it highly improbable.

"It is easy to conceive of a case in which a man of large estate might, before the passage of the act of 1916, have made considerable transfers to relatives, friends, or to charitable or educational institutions in somewhat the same fashion as Grafflin did, reserving for some residuary legatee a comfortable and even handsome balance of his estate. If the government is right, such legatee might be stripped of every penny of the testator's bounty. The taxes on the transferred property might amount to more than the residue of the estate, large as the testator had every reason to

suppose it would be, and the Supreme Court, in langauge already quoted, has held that the courts will not assume that Congress intended any such consequences. *Union Pacific R. R. Co.* v. *Snow*, *supra*.

"It follows that the demurrer to the declaration must be overruled generally."

This conflict of opinion among enlightened judges, together with the amendment of the law in suit by Congress in 1919, are, it is submitted, alone sufficient to establish that it is doubtful whether Congress intended the act of September 8, 1916, to operate retroactively so as to tax transfers made many years before its enactment.

Turning now to the language of the act which the Government asserts supports its demand for a retroactive tax, it will be found that it does not require any such construction. The act contains no express language of necessary retroactive connotation. The argument seems rather to be that it contains some expressions which, if given an unlimited effect, may embrace the past; in other words, that language which, as matter of legal construction could have a prospective application alone at least as well as it could have a retroactive application, must, nevertheless, be interpreted retroactively. Such a contention presses the literal reading of the law to the extreme. It overlooks the settled rule that "courts will not . . . enforce a literal interpretation when by so doing antecedent rights are affected or human conduct given a consequence it did not intend," and that "such a purpose the courts refuse to assign to the legislature unless compelled by language explicit and imperative" (*Union Pacific R. R. Co.* v. *Snow*, 231 U. S. 204, 213), as well as the "principle which has always been held sacred in the

United States that laws by which human action is to be regulated look forward, and not backward, and are never to be construed retrospectively, unless the language of the act shall render such construction indispensable" (*Reynolds* v. *McArthur*, 2 Pet. 417, 434).

The Government regards as immaterial or negligible the fact that the retroactive interpretation would work injustice. Yet this court has repeatedly declared, upon the fullest consideration, that "where a particular construction of a statute will occasion great inconvenience, or produce inequality and injustice, that view is to be avoided, if another and more reasonable interpretation is present in the statute" (*Knowlton* v. *Moore*, 178 U. S. 41, 77), and that "general terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence" (*United States* v. *Kirby*, 7 Wall. 482, 486). It is, therefore, unavailing to argue that the act of September 8, 1916, imposes a tax "upon the transfer of the net estate of *every* decedent dying after the passage of this Act" (sec. 201), and that, therefore, the tax is intended to be imposed upon *every* past transfer of *every* such decedent. When one recalls to mind the enormous gifts made prior to September 8, 1916, by men like Mr. Rockefeller and Mr. Carnegie, the menace which lurks in a retroactive interpretation of the statute is clearly revealed. If those gifts be found to have been made either in contemplation of death or to take effect at or after death, their total value as of the time of death would be the measure of the tax, which is progressive in character. A most substantial tax would then inevitably be laid upon the estate of the transferor, which might

certainly be thereby seriously impaired and, conceivably, even wiped out altogether.

Moreover, the property which has thus been given away in life may now, at the time of death, be many times more valuable than it was when given. The tax, however, is measured upon and by the value at death. The injustice worked by that circumstance is aggravated by the fact that at death the property in question may no longer belong to the original transferee. He may have disposed of it many years before it appreciated in value, and thus he, too, may not have profited by the accretion in value, but, nevertheless, the transferor's estate would be taxed upon and in accordance with the value at death, although it might well be that neither he nor the object of his beneficence had ever known or had the advantage of the increased value. And if it happened that the transferor's estate was insufficient to pay the tax, the burden thereof would then, by the terms of the act (sec. 209), directly fall upon the transferee.

The Government, however, contends that the intent of Congress to make the transfer tax in question retroactive is expressed in the language of subdivision b of section 202 of the act of September 8, 1916, to the effect that the gross estate shall include "any interest of which the decedent *has at any time made* a transfer, or with respect to which he *has created* a trust," etc. The past tense thus used is pointed to and relied upon as indicating a legislative intent to have the act operate retrospectively. But it is submitted that the past tense was employed for no such purpose. A perusal of the section will disclose that it speaks as of the time of the death of the decedent, which, according to section 201, must be "after the pass-

age of this Act." Thus, section 202 defines "the value of the gross estate of the decedent . . . at the time of his death" by including therein the interests specified "of which the decedent *has* at any time *made* a transfer, or with respect to which he *has created* a trust". Referring in this way to the future death of the decedent, the section necessarily had to use the past tense in order to deal with acts done during the decedent's lifetime. The tense employed has its appropriate function in this relation; but it by no means follows from the mere use of the past tense that the words "has . . . made a transfer, or . . . has created a trust" traverse the indefinite past. Their use is accorded apt and full effect if they are made to go backward from the date of death only to the time of the enactment of the law. That would satisfy the established canons of statutory interpretation, give the language its ordinary meaning and avoid unjust and oppressive results.

Indeed, if we lose sight of the fact that section 202 speaks as of a time "after the passage of this Act," the entire clause is given an absurd meaning. If it be construed to speak as of the date of the passage of the act, the words "has made" and "has created" would refer only to transfers made and trusts created before the passage of the law. That would result in taxing only transfers made and trusts created before the statute was passed, and would leave untaxed all transfers made and trusts created after its enactment. Obviously that was not the intent of Congress, and this outcome confirms the view that the past tense is employed in section 202 only because that section was intended to speak as of the time of the death of the decedent.

In the case of the *Succession of Westfeldt*, 122 La. 836, 842, the state constitution provided that no inheritance tax should be levied where the property donated or inherited "*shall have borne* its just proportion of taxes prior to the time of such donation or inheritance". It will be observed that this use of the future perfect tense is the substantial equivalent of the past tense as used in subdivision b of section 202 in the case at bar, and there, too, the taxing authorities attempted to assert a right to tax retroactively. The court, however, repudiated the contention, saying:

> "We are of opinion that the provisions of the constitution . . . do not extend or reach back to conditions anterior to the constitution itself; that the constitution looks to the present and to the future, not to the past."

The phrase "at any time" in subdivision b of section 202 is singled out by the Government as requiring a retroactive construction and effect. It is argued that transfers made at any time in the past are included in the gross estate for the purposes of the tax by virtue of the provision that the gross estate shall embrace interests "of which the decedent has *at any time* made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect at or after his death."

It will be at once noted that the phrase "at any time" is not employed in the clause which deals with the creation of trusts. In the subsequent act of February 24, 1919 (40 Stat. 1057), however, Congress did insert those words in the act so as to make the gross estate cover, not only the interests "of which the decedent has at any

time made a transfer", but also those of which "he has *at any time* created a trust", etc. The subsequent amendment should, therefore, "be regarded as a legislative declaration that the law did not, as originally passed, embrace the provisions which the later act supplies" (*Matter of Miller*, 110 N. Y. 216, 222; *United States* v. *Field*, 255 U. S. 257, 265; *Smietanka* v. *First Trust & Savings Bank*, Oct. Term, No. 540, decided February 27, 1922). The case at bar is, consequently, not within the purview of the act of September 8, 1916, in any event, for it is a case in which the donor, Henriette Lachman, created a *trust* more than fifteen years before the passage of the law.

Aside, however, from this consideration, it is obvious that the words "at any time" do not require a retroactive application of the taxing act. They can be accorded apt force and effect without recourse to any such exceptional, doubtful and unjust taxation. In subdivision a of section 202 transfers of the decedent's interests which take place "at the time of his death" are dealt with. It was, therefore, entirely proper for Congress to make clear in the immediately following subdivision of the same section that the transfers in contemplation of death or to take effect in enjoyment or possession at or after death, which are there dealt with, were not confined to those which occurred at the time of death, but included those made "at any time" prior thereto.

But the purpose with which Congress used the words "at any time" appears when one considers the relation between them and the sentence which immediately follows that in which the words in question occur. The second sentence of the subdivision declares that—

> "Any transfer . . . made by a decedent within two years prior to his death . . . shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."

With nothing in the subdivision to counteract its effect, the sentence quoted would have afforded ground for the contention that transfers in contemplation of death could only be those which were "made by a decedent within two years prior to his death." To eliminate the possibility of any such reading of this sentence, Congress wrote into the preceding sentence the direction to include in the decedent's gross estate the interests "of which the decedent has *at any time* made a transfer . . . in contemplation of . . . death." As District Judge Rose has tersely expressed it in *Curley* v. *Tait*, 276 Fed. 840, 843:

> "Congress may well have thought it important to make clear that the length of time before the death at which a transfer took place was not to be a controlling circumstance. The words used were apt to express that intention, and may well have been employed with the limitation, usually implied, that they were not to affect transactions which had already taken place."

Moreover, section 209 of the act supports the prospective interpretation of the act, for it provides in part that—

> "If a decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death . . . and if the tax in respect thereto is not paid when due, the transferee or trustee shall be personally liable for such tax, and such property to the extent of the decedent's interest therein at the time of

> such transfer shall be subject to a like lien equal to the amount of such tax," etc.

This provision relates to both transfers made and trusts created before death; but, as its language plainly shows, it is of prospective operation only. It uses no past tense. It does not employ the words "at any time". It cannot, however, be reasonably doubted that it was intended to cover the same ground as section 202. If a retroactive intent had animated Congress, section 209 would have been phrased quite differently. It would then have provided that if a decedent "has at any time heretofore made or shall hereafter make" a transfer or trust, the transferee shall be liable for the tax in the manner and under the circumstances mentioned in section 209. Any clear intention to impose such an extraordinary and novel tax upon transferees, reaching back throughout the unlimited past, and that, too, whether they had or had not continued to own and enjoy the property, would certainly not have been left to implication, but have been expressed in as plain language as was used, for example, in the act of 1864, quoted above at p. 17.

A consistent construction of sections 202 and 209 is, therefore, to be found only in viewing their provisions as prospective; and, of course, the court will endeavor to harmonize all the provisions of the act, if possible. *A. Bryant Co.* v. *N. Y. Steam Fitting Co.*, 235 U. S. 327, 337; *Market Co.* v. *Hoffman*, 101 U. S. 112, 116.

It has been further suggested that if the act be construed as inapplicable to transfers prior to its passage, the clause which erects a presumption that a transfer made within two years prior to death was made in con-

templation of death, is not given due force and effect. But the contrary seems reasonably clear. This rule of evidence becomes effective from the day of the enactment of the law. It at once shifts the burden of proof to the taxpayer in respect of *every* transfer made on and after September 8, 1916, and keeps the burden there for two years. After that period has elapsed, only such transfers as are made within two years before the death of a decedent are governed by the statutory presumption. This construction thus accords the clause proper and prospective effect. The act of September 8, 1916, was designed to set up a permanent system of taxation, and it would not have been possible to insert in it a provision casting the burden of explanation upon the estate or the transferee under the specified circumstances, except by the use of substantially some such language as was in fact employed. The clause, it will be borne in mind, is not a taxing clause; it does not attempt to levy any tax; it provides a mere rule of evidence. It would, therefore, be quite extraordinary to attempt to spell out of it the clear and imperative command to tax which the law requires of retroactive tax legislation.

What has thus far been written sufficiently discloses that no clear language of necessary retroactive force is to be found in the statute which would sustain the contention of the Government, but solely broad general terms almost always to be found in general laws. This court has, however, repeatedly held that such generality is not sufficient warrant for retroactive, unusual or exceptional taxation or legal effect. *Evans* v. *Gore*, 253 U. S. 245; *United States* v. *Goelet*, 232 U. S. 293, 297; *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 402; *Holy*

Trinity Church v. *United States,* 143 U. S. 457. Thus, in *United States* v. *Goelet, supra,* it was argued that an act which taxed "any citizen" using a foreign-built yacht was applicable to a citizen permanently domiciled abroad. Ths court held to the contrary, Mr. Chief Justice White saying:

> "Indeed we think it must be conceded that the levy of such a tax is so beyond the normal and usual exercise of the taxing power, as to cause it to be, when exerted, of rare occurrence and in the fullest sense exceptional. This being true, we must approach the statute for the purpose of ascertaining whether its provisions sanction such rare and exceptional taxation. Considering the text, we search in vain for the express declaration of such authority. True, it is argued by the United States, that as the tax is levied on any citizen using a foreign-built yacht and as any includes all, therefore the statute expressly embraces a citizen permanently domiciled and residing abroad. But this argument in effect begs the question for decision which is whether the use of the general words, any citizen, without more should be considered as expressing more than the general rule of taxation, or in other words can be treated without the expression of more as embracing the exceptional exertion of the power to tax one permanently residing abroad."

It is submitted that this reasoning is peculiarly applicable in the case at bar. The taxation of past transfers is rare, exceptional and essentially unjust. The words "every decedent" and "at any time", above discussed, should not, therefore, be so applied as to effect such retroactive taxation; and particularly so in view of the fact, as we have seen, that no compelling necessity for such an interpretation exists and that these terms can each be given due force and meaning if read normally and prospectively

and to apply only to transfers made after the enactment of the law.

II.

The sources and judicial history of the provisions embodied in the Estate Tax Act of September 8, 1916, indicate that they were not intended to be retroactive.

It is well-known and generally admitted that the language employed in the Federal Estate Tax Act of September 8, 1916, was derived from the transfer tax laws of the several states. The Ways and Means Committee of the House of Representatives reported that in drafting the bill it had had all the state statutes before it (Report No. 922, 64th Congress, 1st session, p. 5), and it undoubtedly moulded the language of the law in suit in the light of these state enactments and of the interpretation which had been accorded to them by the courts of the several states. The statute in suit reproduces in large part the terminology of the state laws. The state decisions are, consequently, more than ordinarily important in the case at bar, because "it is a well-settled rule of construction that language used in a statute which has a settled and well-known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body". *Kepner* v. *United States*, 195 U. S. 100, 124; see also *Norfolk Southern R. R. Co.* v. *Chapman*, 244 U. S. 276, 280-1; *Willis* v. *Eastern Trust Co.*, 169 U. S. 295, 307; *Blair* v. *Herold*, 150 Fed. 199, 203, affirmed, 158 Fed. 804; *Interstate Commerce Com.* v. *Del., L. & W. RR. Co.*, 220 U. S. 235, 253-4; *McDonald* v. *Hovey*, 110 U. S. 619, 628; *Ocean Co.* v. *Industrial Accident Com.*, 173 Cal. 313, 317.

State statutes had long taxed in terms transfers made in contemplation of death and transfers made to take effect in possession or enjoyment at or after death, as well as transfers at death. In the state courts, however, it had been uniformly recognized as fundamental, and it became soon the established rule of law, that a transfer tax could not be levied upon a past transfer, whether or not made in contemplation of death or to take effect in possession or enjoyment at death. It was reasoned that the tax was inherently an excise imposed upon the exercise of the right or privilege of transfer; that it was imposed in consideration of the protection accorded by the law to the transfer, or in virtue of the right of the state to lay a tax upon the privilege of transfer or succession, which it could regulate, grant, or withhold at will. Where, however, the right or privilege had previously been exercised, that is, where the transfer had already been made and was past, it was perceived by the state courts and distinctly ruled that there was no longer any right or privilege left to be exercised or to tax, that there was now no transfer at all for the law to regulate, or protect, or operate upon, or for the state to permit or to forbid, and that hence it followed that no right or privilege of this nature was in existence upon the exercise of which any transfer tax could in fact be incident, or in consideration of which the tax could be properly exacted. The transferor now had nothing left to be taxed in respect of such a past transfer; he no longer had the property or subject-matter of the transfer, and he was not exercising or about to exercise any right or privilege, or doing any act whatever in respect of a transfer concerning which he required the protection of the state. To

tax him or his estate would, therefore, merely be to impose upon him an arbitrary exaction under the guise of a tax. In such cases, it was apparent that "although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property" (*Brushaber* v. *Union Pac. R. R.*, 240 U. S. 1, 24; see also Cooley on Taxation, 7th ed., p. 695). The transferee now had the property, and perhaps not even that, if he had previously consumed or disposed of it; and he, too, was not now receiving any right, favor, or protection from the law or the state in respect of any transfer to him. If he still held the property, to tax him because he had received it in the past, was in effect to tax him merely because he owned the property, that is, to tax his ownership as such, and thus to subject him to a direct property tax. But as his ownership of property was now no different in any essential respect from the ownership of any other person, it was likewise plain that the selection of such a class of transferees for special taxation was in realty "not the exertion of taxation" but an unwarranted discrimination against them as property owners, and, therefore, an invalid confiscation of property rights. And if it happened that the transferee no longer had the property transferred, as where he had previously consumed or disposed of it, the tax was then as arbitrary as in the case of the transferor, and equally indefensible and unconstitutional.

Mr. Justice Holmes tersely stated the principles governing attempts to tax past transfers as such in the

following extract from his dissenting opinion in *Chanler v. Kelsey*, 205 U. S. 466, 480:

> "If . . . a given state tax must be held to be a succession tax in order to maintain its validity, or if in fact it is held to be a succession tax by the state court of which it is the province to decide that matter, it follows that such a tax cannot be levied except where there is a succession, and when some element or step necessary to complete it still is wanting when the tax law goes into effect. If some element is wanting at that time, the succession depends, for taking effect, on the continuance of the permission to succeed or grant of the right on the part of the State; and, as the grant may be withdrawn, it may be qualified by a tax. But if there is no succession, or if the succession has fully vested, or has passed beyond dependence upon the continuing of the State's permission or grant, an attempt to levy a tax under the power to regulate succession would be an attempt to appropriate property in a way which the Fourteenth Amendment has been construed to forbid. No matter what other taxes might be levied, a succession tax could not be, and so it has been decided in New York. *Matter of Pell*, 171 N. Y. 48, 55; *Matter of Seaman*, 147 N. Y. 69."

The foregoing considerations convinced the state courts that retroactive transfer tax laws were void, and in order to escape that consequence in particular cases, or constitutional doubt upon that score, the state courts, wherever possible, refused to decree a retroactive interpretation to transfer tax acts. Among the principal of these adjudications are the following: *Matter of Pell*, 171 N. Y. 48, reversing 60 App. Div. 286; *Matter of Vanderbilt*, 172 N. Y. 68, 73; *Matter of Delano*, 176 N. Y. 486, 494-5; *Matter of Craig*, 97 App. Div. 289, affirmed on the opinion below, 181 N. Y. 551; *Matter of*

Lansing, 182 N. Y. 238, 242, 247; *Matter of McKelway*, 221 N. Y. 15, 19; *Hunt* v. *Wicht*, 174 Cal. 205; *Provident Association* v. *People*, 198 Ill. 495; *People* v. *Carpenter*, 264 Ill. 400; *Herriott* v. *Potter*, 115 Iowa 648; *Gilbertson* v. *Ballard*, 125 Iowa 420; *Lacey* v. *State Treasurer*, 152 Iowa 477; *Commonwealth* v. *Wellford*, 114 Va. 372; *Succession of Oyon*, 6 Rob. (La.) 504; *Arnaud* v. *Executors*, 3 La. 336; *Succession of Stauffer*, 119 La. 66, 70; *in re Collateral Inheritance Tax*, 88 Me. 587; *State* v. *Safe Deposit & Trust Co.*, 132 Md. 251; *Miller* v. *McLaughlin*, 141 Mich. 425; *State* v. *Probate Court*, 102 Minn. 268; *Executors of Eury* v. *State*, 72 Oh. St. 448; *Carter* v. *Whitcomb*, 74 N. H. 482; *Commonwealth* v. *McCauley's Executor*, 166 Ky. 450. See also *Cahen* v. *Brewster*, 203 U. S. 543, 552-3, affirming *Succession of Levy*, 115 La. 377; and Holmes, J., in *Chanler* v. *Kelsey*, 205 U. S. 466, 479; *Folsom* v. *United States*, 21 Fed. 37; Gleason & Otis on Inheritance Taxation (2nd ed.), pp. 35, 57, 173; Randolph on United States Inheritance and Transfer Taxes (1917), p. 36; Gray on Limitations of Taxing Power, p. 754; *Attorney-General* v. *Parker*, 31 Nova Scotia Rep. 202.

The leading case is the *Matter of Pell*, 171 N. Y. 48. There remainders had been transferred and vested in interest in 1863, and at that time they were not subject to any transfer tax. Thirty-six years afterwards, an act was passed, effective March 14, 1899, which sought, in express terms, to render such previously vested remainders taxable upon the falling in of the life estate. In the *Pell* case that event occurred in December, 1899. The New York Court of Appeals invalidated this attempt to set up a retroactive transfer tax, saying (pp. 55-6):

"This court and the Supreme Court of the United States have held in numerous cases that the transfer tax is not imposed upon property, but upon the right of succession. It, therefore, follows that where there was a complete vesting of a residuary estate before the enactment of the transfer tax statute, it cannot be reached by that form of taxation. In the case before us it is an undisputed fact that these remainders had vested in 1863, and the only contingency leading to their divesting was the death of a remainderman in the lifetime of the life tenant, in which event the children of the one so dying would be substituted. If these estates in remainder were vested prior to the enactment of the Transfer Tax Act there could be in no legal sense a transfer of the property at the time of possession and enjoyment. This being so, to impose a tax based on the succession would be to diminish the value of these vested estates, to impair the obligation of a contract and take private property for public use without compensation.

"The learned Appellate Division reached the conclusion that this amendment of 1899 was unconstitutional, and we agree with them in that regard. They have, however, sustained this legislation on the ground that it is a direct tax upon property and a legitimate exercise of the taxing power. In so holding that learned court uses this language: 'It may seem incongruous that a transfer tax act, which in principle was intended to impose a tax upon the right of succession, should be construed in such a way as to uphold the tax as one upon property. Our conclusion, therefore, upon the whole case is, that if the tax sought to be imposed could only be supported upon the principle that it is a tax upon the right of succession, then there would be objections, among them constitutional ones, to its validity; but that with reference to the estate here involved, if the act can be construed, as with some misgivings we think it can, as a tax upon property, it is free from constitutional objections, and the tax may be upheld.'

"We are of the opinion that it is a violent

presumption as to the intention of the legislature to construe an act, which is avowedly designed to tax the succession of property, on the death of its owner, as a direct tax.

"It would seem to be too clear for argument that the legislative intention in this regard was to deal with the act relating to taxable transfers and with nothing else. . . .

"To say that the act was not an amendment of the law relating to taxable transfers of property is to contradict what plainly appears upon its face."

A similar effort to tax a past transfer was defeated in the *Matter of Craig*, 97 App. Div. 289, affirmed on the opinion below, 181 N. Y. 551. The Appellate Division there said (pp. 291, 296):

> "It seems to me to be immaterial to consider whether the remainders created by the trust instrument to which the appellants have now become entitled are to be regarded as vested or contingent, or whether the instrument is to be regarded as conveying such remainders as gifts *inter vivos* or as gifts *causa mortis*. The point presented by the appeal is that the right as a property right to take the gifts when the time for possession and beneficial enjoyment should ultimately arrive had fully accrued at the date of the marriage and the birth of the children free from any existing tax upon the transfer regarded either as a transfer then made or contemplated in the future, and that subsequent legislation imposing such a tax must be deemed unconstitutional as in effect the taking of private property for public use without compensation or as impairing the obligation of a contract. (Const. art 1, Sec. 6; U. S. Const. art. 1, Sec. 10, subd. 1.) In other words, the appellants contend that at least as early as May 9, 1885, they had acquired their rights by irrevocable deed; that such rights whether vested or contingent then constituted present property interests in future estates which were vested in the sense

that they were secured to them by deed subject only to contingencies as to time and survivorship; that incident to the ownership of such property was the absolute right to its acquisition in possession and enjoyment at the stipulated time; and that such ultimate right of possession and enjoyment, being absolute and not merely privileged, could not afterwards be taxed by the State because of well-settled principles of constitutional law. I am inclined to the view that the contention is sound. In the discussion the appellants must be regarded on May 9, 1885, as being in the same position as they would have been in if the remainders had been acquired by purchase instead of gift, and it cannot be that the State can levy an assessment upon the right of a citizen to enjoy the fruits of a prior purchase which when made was wholly free from such an imposition. . . .

"I do not lose sight of the fact that the transfer tax is levied, not upon the property affected, but upon the right of succession. The underlying principle which supports the tax is that such right is not a natural one but is in fact a privilege only, and that the authority conferring the privilege may impose conditions upon its exercise. But when the privilege has ripened into a right it is too late to impose conditions of the character in question, and when the right is conferred by a lawfully executed grant or contract it is property and not a privilege, and as such is protected from legislative encroachment by constitutional guaranties."

The doctrine thus announced in the *Matter of Pell* and *Matter of Craig, supra,* is not only well settled in the State of New York, but has been followed and established throughout the country. It was expressly approved and adopted in California in *Hunt* v. *Wicht,* 174 Cal. 205. In that case a husband had made a transfer to his wife in 1905, when there was no law taxing such

a transfer by husband to wife. In 1911, however, a statute was passed imposing a tax upon any transfer by deed "made without valuable and adequate consideration in contemplation of the death of the grantor, . . . or intended to take effect in possession or enjoyment at or after such death", and taxing it when the party taking "becomes beneficially entitled in possession or expectancy to any property . . . by any such transfer whether made before or after the passage of this act." The husband died in 1913, and thereupon the wife went into possession under the transfer of 1905. A tax was claimed in respect of the transfer to her upon the ground that it was made in contemplation of death, as well as upon the ground that it was intended to take effect in possession and enjoyment at death. The court held that the transfer was made and complete in 1905; that, under it, the wife had acquired a vested remainder, and that, consequently, no transfer tax could validly be imposed upon this past transfer, despite the fact that the wife did not come into the actual possession of the property until the death of her husband. The court reasoned as follows (p. 208):

> "We have then the case of a grant of land so executed and delivered on April 12, 1905, as to be fully operative and effective on that date to vest a present title in the grantee, subject only to a life interest in the grantor; 'an executed conveyance' (*Estate of Cornelius*, 151 Cal. 550) of this property in fee simple absolute, subject only to this life interest. Could the legislature subsequently lawfully impose a succession tax upon this fully executed transfer of title, such tax accruing at the termination of the grantor's reserved life estate, simply because in the meantime the grantee was debarred by the intervening life estate from

actual possession of the property conveyed and the other incidents of a life estate? It appears to us that to state the question is to answer it. The succession to the property by the grantee, which is the thing attempted to be taxed, was complete upon the delivery of the deed in escrow, notwithstanding the reservation of the life estate. The whole estate conveyed vested irrevocably in interest at once, notwithstanding that actual possession of the property itself and enjoyment of the profits thereof were deferred until the death of the life tenant. His death added nothing to the title theretofore acquired by the grantee, and there was no transfer of any property in any legal sense at the time of such death, or at any time subsequent to the delivery in escrow. The right of the grantee to have actual physical possession of the property itself and enjoyment of the other incidents of an estate for life upon the death of the life tenant was absolutely vested by the delivery of the deed in escrow, and non-defeasible, and the legislature could not thereafter lawfully destroy, impair, or burden this property right under the guise of a succession tax on account of the transfer."

In Illinois and other jurisdictions the same result has been attained by refusing to give a retroactive construction to statutes which were not so unambiguously retroactive as those involved in the foregoing cases. Thus, in *People* v. *Carpenter*, 264 Ill. 400, 408, the court declared:

"If appellee's (State of Illinois') construction be correct, the necessary effect will be to give the act a retrospective operation, and it will have to be held to be applicable to all voluntary dispositions of property that have been heretofore made in this state. If it be conceded that the power, under the Constitution, exists in the Legislature to pass an act so broad and sweeping in its terms as this would be under the construction contended

for, we would not be justified in attributing such an intention to the Legislature upon any mere doubtful or ambiguous language. Ordinarily statutes will not be given a retrospective effect unless there is no other reasonable interpretation to be placed upon their language. Let it be supposed, to illustrate, that 20 or 30 years before this statute was passed a property owner conveyed all of his estate to his children as a voluntary gift, reserving to himself a life estate, only, in the property. The title vests in remainder, upon the delivery of the conveyance, in the donees. If the donor died after the statute of 1909 went into effect, under appellee's construction the conveyances to the children would be subject to the transfer tax. We are constrained to believe that the Legislature never intended any such result."

In *Herriott* v. *Potter*, 115 Iowa 648, 652, the court reasoned similarly in the following language:

"The inheritance tax is not levied on property, but depends wholly on the collateral heir taking property. It is on the right to succeed to ownership, and after this has passed to the heirs the estate has fallen out of the class at which the particular tax is aimed, and become subject to that rule of equal taxation, guaranteed to all property of like character. If a tax on succession, the amount of which cannot be ascertained, may relate back one year, so as to compel payment by those who have acquired property by inheritance within that time, then it may stretch back over a period of 20 or any number of years, and the citizen never know with any degree of certainty what burdens are to be imposed."

In *Commonwealth* v. *Wellford*, 114 Va. 372, 379, the court, after reviewing the authorities, summarized their effect as follows:

"These cases illustrate the doctrine (which is plain on principle without authority) that a collateral inheritance tax statute, which becomes a

> law after an estate has vested in interest, cannot apply to such an estate, though it does not come into the actual possession and enjoyment of the owner until after the passage of the act."

The doctrine of the foregoing authorities has been substantially recognized in this court. In *Cahen v. Brewster*, 203 U. S. 543, 552-3, it was argued by counsel that it was an unconstitutional discrimination for a state to impose a transfer tax where the succession was still open while failing thus to tax where the succession had been closed. Of course, it was clear that where the succession had been closed, the transfer was made and complete, and, therefore, as has been shown, a thing of the past and no longer taxable. That fact distinguished it in a most important respect from the case in which the succession, and hence the transfer to be effected thereby, were not yet complete. The latter case remained a proper subject for taxation; and, accordingly, this court so ruled. Mr. Justice McKenna speaking for the court, among other things, said:

> "Plaintiffs in error also contended that the statute denied them the equal protection of the laws. This contention is based on the following provision of the statute: 'This tax to be collected on all succession not finally closed and administered upon, and on all successions hereafter opened.'
>
> "Successions which have been closed, it is said, are exempt from the tax, and a discrimination is made betwen heirs whose rights have become fixed and vested on the same day. Counsel say: 'The closing of the succession cannot affect the question as to when the rights of the heirs vested; and cannot be a cause for differentiation among the heirs; and such a classification is purely arbitrary. Besides, such a classification rests on the theory that the tax is one on property, when in fact it is

one on the right of inheritance.' But, as we understand, the Supreme Court made the validity of the tax depend upon the very fact which counsel attack as an improper basis of classification. The court decided that the property bequeathed was property the State could tax, 'until it had passed out of the succession of the testator.' It was certainly not improper classification to make the tax depend upon a fact without which it would have been invalid. In other words, those who are subject to be taxed cannot complain that they are denied the equal protection of the laws because those who cannot legally be taxed are not taxed."

As a corollary of the settled doctrines of state transfer taxation which prohibits the taxation of past transfers, there has grown up the rule that the liability for a transfer tax is both measured and determined by the laws in force at the time when the transfer occurs. If at that time an exemption is accorded, no subsequent law can validly increase or decrease it, so far as a past transfer is concerned; if at that time one rate of taxation obtains, no later law can raise or lower such rate, in respect of past transfers. In California this rule is strictly observed. Thus, if the transfer tax rate be lowered, it is held that the new rate cannot validly apply to the prior transfer, because to make it applicable would be to interfere with the then vested right of the state to the larger tax, and thus, in effect, to give to private parties a portion of the state's property, which is forbidden. In the very recent case of *Potter v. Chambers*, 63 Cal. Dec. 141, 143, Chief Justice Shaw said:

"The transfer of October, 1908, immediately passed to Jesse S. L. Potter the title to the property as of that date. It is settled law that the tax is levied on the transfer of title, or on the exercise of the right to transfer the title, includ-

> ing, of course, the right of the transferee to receive it, and not on the property itself, and that while the provisions imposing the tax on prior transfers in contemplation of death or with intent that they take effect in enjoyment at death are but safeguards against attempts to evade the tax, the recipient of a present transfer of that character is bound only for the inheritance tax due upon it under the law in force at the time the title passes, and the legislature has no power to raise the rate or increase the tax on such transfer by a subsequent act. (*Hunt* v. *Wicht*, 174 Cal. 205; *Est. of Felton*, 176 Cal. 663; *Est. of Gurnsey*, 177 Cal. 214; *Nickel* v. *State*, 179 Cal. 128; *Est. of Brix*, 181 Cal. 671-2; *Est. of Murphy*, 182 Cal. 746; *Est. of Miller*, 195 Pac. 417; *Chambers* v. *Gibb*, 198 Pac. 1032; *Chambers* v. *Lamb*, 199 Pac. 34). . . .
>
> "It is also settled that the right to such tax vests in the state at the date of the taxable transfer, and that the legislature cannot by subsequent acts reduce the rate of taxation thereon, since to do so would be to make a gift of the property of the state to the extent of the reduction, contrary to section 31, article IV of the constitution. (*Est. of Stanford*, 126 Cal. 118; *Trippet* v. *State*, 149 Cal. 521; *Est. of Woodard*, 153 Cal. 39; *Est. of Martin*, 153 Cal. 227; *Est. of Kennedy*, 157 Cal. 527; *Est. of Rossi*, 169 Cal. 149.)"

See also *Matter of Sloane*, 154 N. Y. 109, 113; *Matter of Davis*, 149 N. Y. 539; *Matter of Abraham*, 151 N. Y. App. Div. 441, 442; *State* v. *Safe Deposit & Trust Co.*, 132 Md. 251, 253; *Pullen* v. *Commissioners*, 66 N. Car. 361; *Commonwealth* v. *Eckert*, 53 Pa. St. 102.

The authorities discussed in this point clearly show that in the several states it is not competent to tax past transfers as such, and that the state courts have in numerous cases refused to accord retroactive force and effect to substantially the same formulae of taxation

as are now embodied in the Federal Estate Tax Act of September 8, 1916. In the jurisprudence of the states, those terms in a transfer tax act do not import retroactive operation. Such was and is their settled legal meaning in the United States, and it is submitted that Congress must be presumed to have had in mind that meaning and to have intended precisely that effect when, presumably cognizant of the judicial determinations mentioned above, it wrote the language which is now before this court for interpretation and application.

III.

THE ESTATE TAX ACT OF SEPTEMBER 8, 1916, IF APPLIED TO PAST TRANSFERS WOULD BE UNCONSTITUTIONAL IN THAT IT WOULD CONSTITUTE IN SUBSTANCE AND PRACTICAL EFFECT AN UNAPPORTIONED DIRECT TAX, IF A TAX AT ALL.

In the case at bar, the incidence of the tax in suit is directly upon the estate of the deceased life-tenant, the testatrix, Mrs. Lachman, although she left no interest in the property she had transferred in 1901, and although no interest in that property passed to her legatees under her will or by way of succession. Her estate is selected for taxation solely because of transfers which were made and completely closed many years before the enactment of the tax law. The statute, if construed to apply, would plainly not impose a tax upon a transfer by will or upon succession to the property of a decedent. The transfer thus taxed had been made in 1901 and no property interest whatever is being transferred or succeeded to as part of a decedent's estate. In essence and final analysis, it is a tax upon the estate left by a decedent, dependent solely

upon the fact of some past act of transfer, and measured in part by the present value of property so transferred in the past. It is submitted that any such selection of a class—that is, of those who have made certain transfers in the past—in order to levy a tax upon their estates, measured by the value of property which they have long since ceased to own, is, if the exertion of the power of taxation at all, as direct a tax upon the property or estate of the particular class so selected as would be a tax upon such property or estate by name. If, however, it be termed a tax upon the estate of a decedent measured by the value of past transfers, then it is obviously not a transfer tax in the nature of an excise payable upon the doing of certain acts, but an unapportioned direct tax upon the property of the decedent, and as such is measured by the wholly arbitrary standard of the present value of property long since parted with.

The state courts, in adjudicating the invalidity of a tax upon past transfers, have uniformly recognized the essential difference between a tax on past and a tax on future transfers. A future transfer involves a privilege to be exercised or an act to be authorized or protected by the law, as well as a situation within the contemplation of the transferor when he does the taxable act in the light of the then existing circumstances of tax law and liability. A past transfer involves none of these elements. There is now no privilege to be exercised and no act to be authorized or protected by the law. There is left no situation which the parties may accept or reject at will and thus accept or decline tax liability. The transfer has been wholly and irrevocably made, and to tax it is to do so quite regardless of any present power of elec-

tion in the parties. Nothing which they can now do can alter the matter—the tax must be paid. This "element of absolute and unavoidable demand" (*Thomas* v. *United States*, 192 U. S. 363, 371), has frequently been noted as one of the characteristics of a direct tax as contradistinguished from an excise or indirect tax. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 151-2; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 558. Thus, in the *Flint* case Mr. Justice Day, referring to the Corporation Income Tax of 1909, declared that:

> "The requirement to pay such taxes involves the exercise of privileges, and the element of absolute and unavoidable demand is lacking. If business is not done in the manner described in the statute, no tax is payable."

As to transfers subsequent to the passage of the act of September 8, 1916, it can readily be perceived that no one need make such a transfer unless he sees fit; and that, if he does, the consequent tax liability is only of his own election. He avails of the protection afforded by the law to such a transfer. Such an imposition is truly an indirect tax or excise upon the act or transaction of transfer, though payable at the death of the transferor, for it is "levied upon the happening of an event" (*Knowlton* v. *Moore*, 178 U. S. 41, 47), or "because of the particular occasion which gives rise to its levy" (*id.*, p. 81). But where the transfer occurred many years before the taxing act, the transaction stands upon quite a different footing. The transfer then cannot be undone; the taxpayer can make no choice; there is no longer any act to be done; the event has happened and no longer exists; the occasion for the tax has come and gone while there was no tax liability. Under such cir-

cumstances, the tax is not an indirect tax, but, considered in the most favorable light, in substance and effect a direct tax in the operation and incidence of which the element of absolute and unavoidable demand and liability are necessarily present.

In the case at bar, the present imposition is a direct tax upon Mrs. Lachman's estate because there is no longer any transfer or succession to be taxed. It is similar to a tax levied upon persons because they had imported or manufactured or sold merchandise in the past. That, it is submitted, would be a direct tax upon the present property of such importers, manufacturers and sellers. It would not at all resemble the indirect taxes laid upon present or future imports, manufactures or sales. These are obviously escapable; they lack the element of absolute and unavoidable demand; they involve acts or transactions protected by the law. But a tax upon past importation, or manufacture, or sale, as such, like a tax upon past transfers, is an absolute and unavoidable demand, and hence, a direct tax.

So, indeed, have the rulings in the state courts viewed the matter in principle. Thus, in the *Matter of Pell*, 60 N. Y. App. Div. 286, the Appellate Division which thought it possible to uphold a tax upon a past transfer as a present property tax, recognized the plain distinction between the taxation of past and future transfers, and said (pp. 288, 290):

> "If we could conclude under the Transfer Tax Act, that nothing could be taxed but the right of succession, then it would follow in this case, as the right to succession passed in 1863, that the property here involved was not taxable. . . .

> Here this tax must be supported, if at all, upon the theory that it is a tax upon property. . . .
>
> "What the legislature here intends is to tax property. . . . It could not very well tax the right of succession, for that had taken place years before the Tax Act was passed; and we think, therefore, that the tax can only be supported upon the principle that it is a tax on property."

The Court of Appeals, however, reversed this ruling (171 N. Y. 48), as we have seen, upon the ground that a tax upon a past transfer was not a transfer tax at all, and refused to hold that a property or direct tax was, as matter of fact or construction, intended by the legislature, although the court declared that such a tax would also be void, saying (at pp. 55, 56):

> "They [*i. e.*, the Appellate Division] have . . . sustained this legislation on the ground that it is a direct tax upon property. . . .
>
> "We are of the opinion that it is a violent presumption as to the intention of the legislature to construe an act, which is avowedly designed to tax the succession of property, on the death of its owner, as a direct tax. . . .
>
> "We might well be justified in declining to further consider the question of whether this is an effort to impose a direct tax upon property."

But "assuming, however, that the legislature intended to exercise its power of direct taxation" (p. 57), the court found that that would be likewise invalid; and Chief Judge Parker placed his concurrence in the decision upon the ground that the tax act did "not provide for a direct tax upon property and [that] in so far as it [aimed] to tax transfers of estates already vested when the act was passed, . . . it [was] void" (p. 60).

In the *Matter of Craig*, 97 App. Div. 289, 296, affirmed on the opinion below, 181 N. Y. 551, the court

again directed attention to "the fact that the transfer tax is levied, not upon the property affected, but upon the right of succession," and that—

> "The underlying principle which supports the tax is that such right is not a natural one but is in fact a privilege only, and that the authority conferring the privilege may impose conditions upon its exercise. But when the privilege has ripened into a right it is too late to impose conditions of the character in question; and when the right is conferred by a lawfully executed grant or contract it is property and not a privilege, and as such is protected from legislative encroachment by constitutional guaranties."

Viewing the matter "according to truth and substance," and "without regard to form" (*Eisner* v. *Macomber*, 252 U. S. 189, 206), a tax upon a past transfer is, in its effect and incidence, a direct tax on property or ownership as such. A tax of so many dollars an acre would be the plainest example of a direct tax. A like tax upon the privilege of having heretofore transferred or received the land, would be precisely the same in every substantial particular. The name would be different but nothing else, and "the name by which a tax is described . . . is, of course, immaterial." *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288, 292, 294; see also *Kansas City Ry.* v. *Kansas*, 240 U. S. 227, 235; *Eisner* v. *Macomber*, 252 U. S. 189, 206. No privilege would be in fact involved or exercised; in final analysis, the past or present ownership of property would alone be taxed. But "the mere right to own and hold property cannot be made the subject of excises, since the levying of a tax by reason of ownership of property is to tax the property"

(*Craig* v. *E. H. Taylor & Sons*, 232 S. W. 395, 396, Ky.; *Dawson* v. *Kentucky Distilleries Co.*, *supra*).

The Constitution of the United States indisputably requires the apportionment of direct taxes (art. I, secs. 2 and 9) and "this limitation still has an appropriate and important function, and is not to be overridden by Congress or disregarded by the courts" (*Eisner* v. *Macomber*, 252 U. S. 189, 206). It must, therefore, be accorded a substantial meaning and effect. It must be self-evident, however, that that limitation could be almost entirely circumvented and practically nullified, if past transfers might be taxed under the name of excises. Every sale, gift, or other disposition of property—however long past—would then be brought within the scope of so-called indirect taxation, and virtually all property and ownership placed within its reach. It is reasonably certain that the framers of the Constitution would have viewed any such taxation as direct to all intents and purposes. Those who insisted that the apportionment limitation be twice written into the Constitution would have at once realized that they had secured no actual protection thereby if a tax could be levied upon the value of all property that had ever been transferred in the past. The immunity which they then insistently sought would prevent, for example, a tax upon land *eo nomine*, but would impose no obstacle to a precisely like tax upon any transfer of the land by sale, gift, succession, or otherwise. Here would be a so-called excise, privilege, or indirect tax, which no owner of property could escape and to which he would be subject merely because he now or in the past had owned property. "A tax upon

property holders in respect of their estates, . . . the payment of which cannot be avoided, [is a] direct tax," this court held in the *Pollock case*, 157 U. S. 429, 558, and in the recent case of *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288, 294, it was declared that "to levy a tax by reason of ownership of property is to tax the property." What but a property or a direct tax is a tax upon the past transfer of property measured by its value? It certainly is not a tax upon a transfer, for there is none to tax. The sovereign is not granting a privilege nor affording protection to any one in respect thereof. At most, the protection now accorded is precisely the same as that given to any other property or owner. All that remains is the property and its present owner or former owner, and all that can now be taxed is the property or the ownership as such.

It was undoubtedly the foregoing considerations which led District Judge Mayer to rule in *Kissam* v. *McElligott* (not reported; reversed, 275 Fed. 545; now pending in this court, October Term, 1921, No. 602), as follows:

> "The tax imposed by section 202 [of the Estate Tax Act of September 8, 1916] is clearly a succession tax. . . . If construed retroactively, from one standpoint it would impose a tax on property owned by Cornelia Kissam prior to the passage of the act and might be open to serious constitutional objections on the ground that it imposed a direct tax without apportionment among the states."

The true nature of an alleged transfer tax imposed upon transfers long past and completed is further revealed in the act of September 8, 1916, by the fact that the tax thus laid is, in the first instance, payable by the estate of the transferor, and payable, not in accordance

with the value at the time of the transfer, but in accordance with the value at the time of his death. Where a transfer was previously completely made, it is self-evident that the transferor and his estate now have nothing for the tax to attach to. The property has long been out of his hands. He and his estate need and can have no legal protection in this respect. The privilege of transfer has likewise long since disappeared. The original owner does not now ask any such privilege, and requires and avails of no legal protection in that regard. It follows, therefore, that, so far as the transferor and his estate are concerned, there is no transfer as such to tax; in other words, the alleged tax is but an arbitrary exaction from the transferor's estate. *Union Transit Co.* v. *Kentucky*, 199 U. S. 194, 202, 204.

The arbitrary character of the tax on past transfers is intensified by the fact that the basis of the liability and the rate depend upon the value of the transferred property at the time of the transferor's death. That means that, perhaps many years after the transfer, when the property may have greatly increased in value, the transferor's estate will be called upon to pay a tax, not only in respect of property which has not been his for many years, but at a value which it has attained in the hands of others long after the transfer. The property may now even have passed out of the ownership of the original transferee; it may have increased in value because the subsequent owners exploited it and found minerals or oil upon it,* its increase in value may have benefited others than either the transferor or the transferee;

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* See *supra*, pp. 10-11, note, where some illustrations are given from official records to show large increases in value in some California lands.

but, nevertheless, the act of Congress makes the value of the property at the time of the death of the transferor the measure of the tax. Unreasonableness and arbitrariness, it is submitted, could not be conceived in any greater extreme. Such a standard is unwarranted, unreasonable and oppressive. It falls within the condemnation visited by this court upon a similar inequitable mode of levying a tax in *Knowlton* v. *Moore*, 178 U. S. 41, 76, 77, where Mr. Justice White said:

> "Granting, however, that there is doubt as to the construction, in view of the consequences which must result from adopting the theory that the act taxes each separate legacy by a rate determined, not by the amount of the legacy, but by the amount of the whole personal estate left by the deceased, we should be compelled to solve the doubt against the interpretation relied on. The principle on which such construction rests was thus defended in argument. The tax is on each separate legacy or distributive share, but the rate is measured by the whole estate. In other words, the construction proceeds upon the assumption that Congress intended to tax the separate legacies, not by their own value, but by that of a wholly distinct and separate thing. But this is equivalent to saying that the principle underlying the asserted interpretation is that the house of A, which is only worth one thousand dollars, may be taxed, but that the rate of the tax is to be determined by attributing to A's house the value of B's house, which may be worth a hundredfold the amount. The gross inequalities which must inevitably result from the admission of this theory are readily illustrated. Thus, a person dying, and leaving an estate of $10,500 bequeaths to a hospital ten thousand dollars. The rate of tax would be five per cent, and the amount of tax five hundred dollars. Another person dies at the same time, leaves an estate of one million dollars, and bequeaths ten thousand dollars to the same institution. The rate

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of tax would be $12\frac{1}{2}$ per cent, and the amount of the tax \$1,250. It would thus come to pass that the same person, occupying the same relation, and taking in the same character, two equal sums from two different persons, would pay in the one case more than twice the tax that he would in the other. . . .

"It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems."

See also *Black* v. *State*, 113 Wis. 205.

The tax under the act of September 8, 1916, does not rest upon any more defensible ground when it falls upon the transferee, as happens, under the terms of the act, when the transferor dies leaving no estate. As has been pointed out above, in that case nothing but the property previously transferred and its present ownership exist. The past transfer itself is, of course, only mere history. The tax is, in that case, a direct tax on ownership as such, or it is nothing but an arbitrary spoliation under the forms of law.

Nor is its measure any more reasonable in this instance. The value of the property at the time of the death of the transferor may, indeed, be an immaterial circumstance, so far as the transferee is concerned. That does not, in any sense, measure what he got by the gift or transfer. He may not own the property at the time of the transferor's death; he may have long previously sold it; he may not have had a cent's worth of benefit

out of its increased value; that may have come to others only long after he ceased to have any connection with the property. To tax him at the greater value, notwithstanding the foregoing considerations, is to transcend anything which law-making bodies in free countries may properly do. *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 599; *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, 24. It is of no consequence whether we designate such a violation of fundamental rights, a taking of private property without just compensation (Cooley on Taxation, 7th ed., p. 695), or an infringement of the guaranty of due process of law, or a violation of "those fundamental conceptions of free government which underlie all constitutional systems" (*Knowlton* v. *Moore*, 178 U. S. 41, 77). In any event, it is an unreasonable and arbitrary exertion of legislative power and not the legitimate exertion of the power of taxation.

It is submitted that the foregoing objections constitute serious and well-founded charges of constitutional infirmity in the Estate Tax Act of September 8, 1916, and that, certainly, none may reasonably regard them as obviously untenable. By the settled rule of law, therefore, the statute in suit should be interpreted so as to avoid this doubt, if fairly present. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407-8; *United States* v. *Bennett*, 232 U. S. 299, 303; *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401. "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score" (*United States* v. *Jin Fuey Moy*, *supra*). This rule does not require the court to pass upon the grave constitutional issues involved in

the case at bar (*United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408; *McNally* v. *Field*, 119 Fed. 445, 448), if the language of the enactment permits of a constitutional interpretation. In this case that is manifestly true; the statute need only be confined to a prospective operation, which is not only the normal situation, but is wholly consistent with every word of the act.

IV.

As to the claim of the Government below that the act of September 8, 1916, imposes a prospective excise tax upon the coming into possession of future estates.

The difficulty of upholding the act of Congress of September 8, 1916, as one intended to tax past transfers and as valid in that respect, has led the Government into advancing somewhat inconsistent contentions in the courts below, which will be examined in this and in the two succeeding points. Thus, it was argued below in the case at bar that the act intended to impose a tax upon the "coming into possession" of future interests created by past transfers, although the act does not specify or import any such incidence, and although the estate of the transferor is primarily made to bear the tax and not the transferee who comes into possession. It must, however, be manifest that this theory does not take into account the attempt of Congress in the very same sentence to tax out-and-out gifts, that is, gifts (without any remainders or future interests) which were made in contemplation of death before the taxing act was passed. In such cases delivery and possession may have actually

taken place many years before the enactment of the law, but such gifts are nevertheless taxable, according to the contentions of the Government. It seems clear that both of these classes of cases were intended to be placed by Congress upon the same footing; they are in fact provided for in the same sentence of the same subdivision of section 202, and the same theory of taxation ought reasonably to be applicable to both, for the same general intent presumably was in mind.

It was further contended that the act imposed a tax upon past transfers under which remainders were created, on the theory that the transfers were not completed until the remaindermen took possession upon the death of the grantor, the life-tenant. Under the law of the State of California, which of course regulates the property interests of the parties in the case at bar, there is no such incompleteness in transfers creating future estates, for it is the settled rule that the transfer now in question vested absolutely in the transferees in 1901. Here, likewise, is a theory which fails to take account of the taxation of outright gifts made in contemplation of death, which belong in the same category, but cannot be said to be incomplete in any sense.

Another theory urged by the Government below was that the act did not tax past transfers at all, but only the transfer of or succession to the assets possessed by the decedent at death, and that it used the past gifts or transfers, namely, those made in contemplation of death or to take effect in enjoyment or possession at or after death, merely as the measure of the tax. This theory is inconsistent with the others, for it does not depend at

all upon coming into possession; and it should also be noted that, under it, no tax would be collectible if the decedent died without assets; and, consequently, any one could defeat the tax merely by transferring all his property shortly before death. Notwithstanding this contention, namely, that the past transfers are used only by way of measuring the tax upon the transfer of the decedent's estate, the Government is, nevertheless, resisting the recovery of the tax in *Levy* v. *Wardell,* now pending in this court, where the decedent died without leaving any property, and in that case the tax is sought to be upheld upon grounds which disregard the so-called measurement and coming into possession theories altogether.

In the act of September 8, 1916, there is no indication or implication of any intent on the part of Congress to tax the so-called "coming into possession" *by third parties* of property previously transferred to them. The act states that the tax is imposed "upon the *transfer* of the net estate" (sec. 201), and this "transfer" is so defined in the act as to embrace (1) transfers which take place at death, (2) transfers made in contemplation of death, (3) transfers made to take effect in enjoyment or possession at or after death, and (4) certain other transfers (sec. 202). Repeatedly the statute refers to "transfer" as the act, transaction, right, or privilege taxed, and the Department of Internal Revenue has itself frequently declared that the tax is solely a transfer tax (*e. g.*, art. IV, Treasury Dept. Regulations No. 37, revised to May, 1917, quoted *supra*, p. 16). Indeed, no other view would seem to be reasonably possible, since the terms of the act in suit are derived from state trans-

fer tax laws, which, as has been seen above, tax only the transfer as such and do not tax past transfers, notwithstanding the fact that the remaindermen first come into possession thereunder after the passage of the taxing act.

The language of the act of Congress, the origin of its clauses, the intent underlying its provisions and the departmental interpretation, all tend to establish beyond doubt the fact that the tax imposed is and was intended to be a transfer tax. This being so, the transfer whereby the remainders are created is the act or transaction taxed, and not any subsequent coming into possession as the result of an already completed transfer whereby remainders were created and vested prior to the passage of the act.

Obviously, if the coming into possession were the act or privilege intended to be taxed, the tax would reasonably and naturally have been imposed upon the transferee who thus came into possession. But the tax in suit is not so imposed except secondarily; it is primarily an estate tax, as its language declares; it is not payable by the remainderman who comes into possession, but by the estate of the transferor, unless there happens to be an insufficiency of assets in the estate. There is no reasonable or logical theory under which a tax can be levied against a transferor or his estate upon the coming into possession by *a third party* of property long before transferred to the latter, for in such coming into possession no right or privilege is exercised by the transferor or his estate and no possible benefit or advantage whatever would result to him or his estate.

Again, the act taxes transfers intended to take effect in possession *after* the death of the decedent, as well as those intended thus to take effect at his death; and in both cases the tax is, nevertheless, collected at the grantor's death and is primarily payable by his estate. If, however, the tax were in fact one upon the coming into possession, it would be only just and reasonable that it should be paid when possession was actually taken, which might not occur for years after the death of the transferor. That, is however, neither the theory nor the practice under the act in question. Indeed, it is expressly provided in section 208 of the act that, except in certain cases, "the tax shall be paid out of the estate before its distribution."

The statute taxes transfers of only such decedents as shall die after the date of passage of the act. But if the act intended to tax the coming into possession, it would not exempt, as it does, transfers made by decedents dying prior to the enactment of the law but which do not actually come into possession until after the passage of the act.

A reading of subdivision b of section 202 will show that it deals, in the same bracket and certainly upon the same plane, with transfers made in contemplation of death and transfers made to take effect in possession or enjoyment at or after death. In such circumstances, it is reasonable to expect that the same intent and theory of taxation should control both. But, under the Government's contention, that is not possible. Gifts to take effect in possession at or after death are, it is contended by the Government, taxable because of the coming into

possession at death; but gifts in contemplation of death are, nevertheless, sought to be taxed, despite the fact that they may have come into possession long before the death of the transferor. A construction of the law should be sought which would be equally applicable to and explain both of these classes of gifts. The prospective interpretation contended for by the plaintiffs-in-error accomplishes that result. It does not have recourse to any such theory as the doctrine of coming into possession. It taxes transfers in contemplation of death as well as transfers to take effect in possession or enjoyment at or after death, *as transfers,* and irrespective of the accrual of possession. If, therefore, it appears that the transfer was made since the act was passed, the transfer is taxable regardless of the time when possession was or will be taken. And so, indeed, the act is construed and enforced by the Government in relation to transfers made after the passage of the law.

It will be observed that under the Government's contention the act operates in different ways forward and backward—when it is prospectively applied, the coming into possession rule finds no place; but when retrospectively applied, this theory is resorted to. Thus there result conflicting theories of interpretation and intent of the same words of the same act.

The Government's contention not only finds no support in the terms of the act, but it is submitted that it argues for a tax which would be unconstitutional. If the tax were imposed upon the right of the transferee to enter into possession of his own property, it would be clearly in substance and effect a tax upon the property

itself, and as such, a direct tax, which must be apportioned. The right to take possession of one's own is plainly the most elemental attribute of the ownership of the property. Without it property is nothing. If one may be taxed upon coming into possession or taking possession, as upon a privilege or as an excise, then virtually nothing might be left of property or property ownership for direct taxation to operate upon as a practical matter. If a remainderman can be subjected to a so-called excise tax upon or because of coming into possession, so may every landlord or reversioner at the end of a term. And it is but carrying the doctrine to its logical conclusion to point out that it would support an excise tax upon a landholder every time he entered upon the property, for it is clear that the landowner who enters his property, the landlord who enters at the end of a tenant's term, and the remainderman who enters at the death of the life tenant, go into or take possession of their own in essentially the same manner. They but exercise an essential right or incident of property ownership in so doing. It must, therefore, be clear that once it is ruled that an excise tax may be properly levied upon the coming into possession by a remainderman, the first step has been taken towards taxing by excises the most essential attribute of property and property ownership as such, and little force and effect would be left in the limitations of the Constitution forbidding direct taxation without apportionment. Certainly if a tax on the right to collect income from property be a direct tax, then a tax upon the right to take or come into possession of property, real or personal, is *a fortiori* a direct tax.

In *Dawson* v. *Kentucky Distilleries Co.,* 255 U. S. 288, a tax was imposed of fifty cents on every gallon of whiskey withdrawn from bond, that is, taken into the possession of the owner. It was argued that that was an indirect tax upon the right to take possession of the liquor, that is, upon the coming into possession thereof, but this court held it to be a direct or property tax, Mr. Justice Brandeis saying (p. 294):

> "In fact the tax is one imposed upon each lot of whiskey at the time it is removed from bond within the State. The tax might be said to be upon the act of removal from the bonded warehouse within the State. But as stated by the lower court, 'the thing really taxed is the act of the owner in taking his property out of storage into his own possession (absolute or qualified) for the purpose of making some one of the only uses of which it is capable, *i. e.,* consumption, sale or keeping for future consumption or sale . . . The whole value of the whiskey depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value.' To levy a tax by reason of ownership of property is to tax the property. . . . It cannot be made an occupation or license tax by calling it so."

Transfers which, although having an origin in the past, are, nevertheless, properly taxable, are illustrated by the decisions which have upheld transfer tax laws in respect of estates still *in custodia legis* and in course of administration, although the decedents had died before the tax law was passed;* and also by the decisions which have upheld taxes laid upon the exercise of powers of

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**Cahen* v. *Brewster,* 203 U. S. 543; *Carpenter* v. *Commonwealth,* 17 How. 456; *Gelsthorpe* v. *Furnell,* 20 Mont. 299; *Montgomery* v. *Gilbertson,* 134 Iowa 291; *Ferry* v. *Campbell,* 110 Iowa 290; *Herriott* v. *Potter,* 115 Iowa 648; *Succession of Stauffer,* 119 La. 66; *De Witt* v. *Commonwealth,* 184 Ky. 437.

appointment, notwithstanding the fact that these powers in the particular cases had been created before the transfer tax laws were passed.* In both of these classes of cases, the transfer tax was sustained because the persons actually taxed were the beneficiaries of privileges exercised and accruing under existing machinery of the law, and because the actual exercise of these privileges occurred after the tax statute was passed. In both of these classes of cases, transfer taxes were sustained on the theory that a right or privilege created or protected by the law was being actually exercised after the tax statute was passed. The probate cases decide that the utilization of probate proceedings is a taxable privilege. But it has been held in such cases that where the estate has been closed *(Cahen v. Brewster)*, or the assets have been distributed *(Succession of Stauffer)*, or probate is unnecessary *(Herriott v. Potter)*, then no tax can be laid by a statute passed after the owner's death. The power of appointment cases decide that the exercise of such a power is in itself a taxable privilege which may be taxed although the power was created before the tax law was passed. In the first class of cases, the probate law and its benefits and privileges are still in course of utilization, and in the second, the exercise of the power of appointment involves the privilege of exercising a power of appointment or the privilege of making a will wherein the power is exercised.

No such theory can be advanced in support of a tax on the coming into possession of a remainder created and vested long before the transfer tax act was passed. The

**Orr v. Gilman*, 183 U. S. 278; *Chanler v. Kelsey*, 205 U. S. 466.

machinery of the law is not utilized by the remainderman, because a remainder "being created by act of the owner of the property, instead of arising by operation of law, its subsequent taking effect in possession, does not depend upon the continuance of the present laws" (2 Tiedeman on State and Federal Control of Persons and Property, p. 638). It does not depend upon probate administration, or the execution of any power or any instrument, or the continuance of the present law, but has its basis in a fundamental and elementary property right unalterably fixed by the law in force when title was acquired and dependent upon nothing but the lapse of time. Therefore, in coming into possession, a remainderman exercises no privilege dependent upon the machinery of the law. His act is an essential prerogative of property ownership and is the mere assertion of a fundamental property right.

Since entry into possession of property, therefore, is not taxable as a privilege, the act of September 8, 1916, would be invalid if it were construed as laying a tax upon the coming into possession, for in that event it would levy a direct tax upon property.

It is true that the states have sometimes taxed coming into possession (*Moffit* v. *Kelly*, 218 U. S. 400). But they are free to tax property or property ownership directly without apportionment, and no federal question arises even when they do so under an erroneous designation (*id.*, pp. 403-5). The decisions above considered (point II, *supra*) make it apparent, however, that a tax upon the coming into possession is not a transfer tax at all, but, on the contrary, a direct or property tax. Perhaps,

nowhere does that more clearly appear than in such a case as the *Matter of Pell*, 171 N. Y. 48, reversing 60 App. Div. 286. There, as we have already seen, remainders had been created prior to the taxing act, but they did not come into possession until after the passage of the tax law. It was clearly recognized by the courts that such a tax was in fact and effect a direct or property tax (60 App. Div. 288, 290, 291, 292; 171 N. Y. 54, 56, 60).

Nothing to the contrary was decided in *Scholey* v. *Rew*, 23 Wall. 331. That case arose under the act of 1864 and concerned a devise of land made by a wife who died in 1869, while the act was in force. The case, therefore, involved only a transfer at death occurring after the passage of an applicable taxing act. The case did not have to do at all with future estates, or postponed coming into possession, or retroactive transfer taxation. The case merely decided that the act of 1864, in taxing a "*future* disposition of real estate by will," imposed a valid transfer tax, and that that tax was an indirect tax. That is not now disputed. But the questions presented in this brief were neither presented nor raised nor were they decided in the *Scholey* case. Indeed, they could not arise, for the transfer involved was made after the taxing act was passed and the gift was not a gift of a future estate, but of one simultaneously and immediately vesting in title and possession.

Nor is the case of *Keeney* v. *New York*, 222 U. S. 525, in point. The case involved a transfer in trust whereby the transferor reserved a life income and created remainders to take effect in possession or enjoyment at her death. The transfer was held taxable since the law by

which the tax was laid was passed in 1896 and the transfer occurred in 1903. The case, therefore, did not deal with the question presented in the case at bar. It was but the typical case of a transfer to take effect in enjoyment at death, made while a transfer tax law was in force.

It was, however, argued in that case by the remaindermen that the taxing act did not tax the transfer whereby the remainders were created, but only the coming into possession thereunder, and that that event was not taxable under a law like that of 1896. But it was held by the court that the intent was to tax the transfer by which the remainders were created and not the coming into possession.

The court also added the following (222 U. S. at p. 533):

> "There is no natural right to *create* artificial and technical estates with limitations over, nor has the remainderman any more right to succeed to the possession of property *under such deeds* than legatees and devisees under a will. The privilege of *acquiring* property *by such an instrument* is as much dependent upon the law as that of *acquiring* property by inheritance, and *transfers by deed* to take effect at death have frequently been classed with death duties, legacy and inheritance taxes." (Italics ours.)

The foregoing quotation clearly does not tend to support the Government's coming into possession argument. It was written in answer to the argument of the Keeney heirs that a transfer creating remainders to take effect at death is in its nature different from a transfer by will, in that the former involves the exercise of a right and the latter a privilege. The court held that the two types of transfers were properly classed together in a trans-

fer tax law and that both involved the exercise of a privilege. It is clear from the phrases italicized above that the court was dealing with *transfers* creating remainders, and *not* with the coming into possession of remainders already created. Moreover, the facts of the case and the opinion as a whole preclude the assumption that the court had in mind a tax upon the coming into possession of already vested remainders. In fact, this point was not dealt with, for the court cut off all suggestion of a tax on coming into possession when it held, as we have seen, that the tax was upon the transfer, which had been made after the tax law was passed. This holding was necessary in order to answer the objections founded upon the fact that the property was not within the jurisdiction at the time of the coming into possession. Nothing more clearly emphasizes the point of the decision than the concluding part of the opinion where the court held that the tax was controlled by the conditions which existed at the time of the transfer made in 1903 and not by conditions which existed in 1907, when the life tenancy terminated and the remaindermen took the property into their possession.

The case of *Wright* v. *Blakeslee*, 101 U. S. 174, decided no question of constitutional law because none was raised. It involved merely a question of statutory construction; and in it the court held that the act of 1864 taxed a bare contingent remainder (not vested remainders such as are involved in the case at bar) when it became a vested estate in possession or expectancy after the passage of the tax law, although created before, because the taxing act expressly applied to every "past", as well

as to every future, "disposition of real estate, by will, . . . by reason whereof any person shall become beneficially entitled, in possession or expectancy, to any real estate" (see p. 177). This clear and unambiguous language compelled the retroactive construction given. Congress, however, did not see fit again to adopt this language in the statute in suit, nor to enact a succession or distributive share tax as in 1864, but enacted a transfer tax payable by the transferor and not by the transferee then coming into possession. On the contrary, Congress chose the language of state transfer tax statutes which had been uniformly interpreted not to operate retroactively, that is, not to tax past transfers.

V.

As to the claim of the Government below that the vested remainders involved in the case at bar can be taxed upon the theory that they were not finally and completely transferred until the death of the testatrix.

It must be manifest that the act of September 8, 1916, does not purport to affect the law of property, wills, descent, or distribution which prevails in the several states, even if it be assumed that any such power resides in Congress. The statute plainly takes the state law as it finds it. *Lederer* v. *Pearce*, 266 Fed. 497, 499; *Wardell* v. *Blum*, 276 Fed. 226, 227. The point was tersely stated as follows by Circuit Judge Woolley in the *Pearce* case, *supra:*

> "From the form of the Federal Estate Tax Act, it is evident the Congress intended that the act should operate not in opposition to but in

harmony with the many different state acts with which, because of its very terms, it would come into contact. *Lederer* v. *Northern Trust Co.* (C. C. A.), 262 Fed. 52. Therefore in creating an estate tax, the Congress very wisely leveled the tax at that property of decedents which is subject to distribution as part of their estates according to the laws of different states (Section 202), after deducting therefrom such expenses, claims and charges against estates as are allowed by the laws of the states under which they are administered (Section 203). Thus it appears that the Federal Estate Tax may reach property in one state when it would fail to reach like property in another, according as the laws of distribution and administration vary in different states."

The law of the state being thus the test, it should at once be pointed out that in California the transfer of remainder interests under such circumstances as obtained in the case at bar is regarded as working complete transfer of title at the time the remainders are created, notwithstanding the postponement of possession until death or thereafter. In *Hunt* v. *Wicht*, 174 Cal. 205, a deed was delivered in escrow upon the agreement that the grantor, the husband, was to receive the income from the property for life and the grantee, the wife, to have the remainder after his death. The court held that this created a vested remainder, and among other things said (p. 208):

"We have then the case of a grant of land so executed and delivered on April 12, 1905, as to be fully operative and effective on that date to vest a present title in the grantee, subject only to a life interest in the grantor; 'an executed conveyance' (*Estate of Cornelius*, 151 Cal. 550) of this property in fee simple absolute, subject only to this life interest. Could the legislature subsequently lawfully impose a succession tax upon this fully

executed transfer of title, such tax accruing at the termination of the grantor's reserved life estate, simply because in the meantime the grantor was debarred by the intervening life estate from actual possession of the property conveyed and the other incidents of a life estate? It appears to us that to state the question is to answer it. The succession to the property by the grantee, which is the thing attempted to be taxed, was complete upon the delivery of the deed in escrow, notwithstanding the reservation of the life estate. The whole estate conveyed vested irrevocably in interest at once, notwithstanding that actual possession of the property itself and enjoyment of the profits thereof were deferred until the death of the life tenant. His death added nothing to the title theretofore acquired by the grantee, and there was no transfer of any property in any legal sense at the time of such death, or at any time subsequent to the delivery in escrow. The right of the grantee to have actual physical possession of the property itself and enjoyment of the other incidents of an estate for life upon the death of the life tenant was absolutely vested by the delivery of the deed in escrow, and nondefeasible, and the legislature could not thereafter lawfully destroy, impair, or burden this property right under the guise of a succession tax on account of the transfer."

It follows from this authoritative ruling that the contention that the transfer of the remainders in the case at bar was not complete until the death of the testatrix, cannot be sustained under the California law. It is clear also, as has been seen above (point II), that throughout the United States generally it is held that when remainders are created, the full enjoyment of which depends only on the flight of time, the transfer is complete and vests the moment the remainders are created (see, *e. g., Matter of Pell*, 171 N. Y. 48, 54).

It should be added that this argument of the Government, like the coming into possession argument discussed in the preceding point, if available for any purpose, is applicable only to transfers creating future estates. It does not apply to absolute transfers *inter vivos* made in contemplation of death, for in such cases the property vests absolutely in the transferee, both in title and in possession, at the moment the gift is made, and there is no subsequent event upon which to rest any suggestion of an incomplete transfer. Here again the Government's contention attempts to deal differently with two classes of transfers which the statute places upon a parity and couples together in the same sentence.

There are, it is true, certain classes of transfers which have been held to be incomplete when made. These, however, have no bearing upon the question now under discussion. For example, it has been held that, if a transfer of title is initiated before a transfer tax law is passed and the transfer is ambulatory and remains in an inchoate and ineffective state until after a transfer tax law is passed, then the transfer is taxable, not through any retroactive operation of the act, but upon the theory that the transfer of title does not take place until the moment the transfer ceases to be incomplete, and the taxing law is then in force and becomes applicable. In *Matter of Seaman*, 147 N. Y. 69, and *People* v. *Carpenter*, 264 Ill. 400, the opinions deal with transfers which remained inchoate, ambulatory and ineffective until the death of the grantor and the transfer of title did not become complete until that time.

The recent cases of *Nickel* v. *Cole*, 256 U. S. 222, and *Carter* v. *Bugbee*, 92 N. J. L. 390, are of the same kind.

In both cases the tax was sustained only because the interest was not fully and completely transferred, according to the applicable local law, until after the taxing act took effect.

The foregoing authorities illustrate the nature of the cases in which transfers have been regarded as incomplete until the death of the transferor. But, obviously, these decisions do not apply to such a case as the one at bar where the remainders were granted and title thereto fully and completely passed and vested in 1901, fifteen years before the death or the passage of the taxing act. It is clear from the *Pell* case, *supra*, and the numerous decisions following it (point II), that a transfer is complete when the title passes, and that remainders by grant are created and title passes completely upon delivery of the instrument of grant and regardless of any subsequent event. The authorities referred to by the Government in the court below do not in any wise militate against these contentions or show any incomplete transfer in the case at bar.

The cases in which the exercise of a power of appointment has been made taxable by a state are likewise not in point here. The states have control over the law of property; they have the right to treat the exercise of a power of appointment as the completion of a transfer or as a new transfer; they may do so generally or for the purpose of taxation only. But the National Government may not re-write the property laws of the several states, and it is manifest that Congress did not attempt to do so in the act of September 8, 1916. The point was well expressed in *Ebersole* v. *McGrath*, 271 Fed. 995, 998, as follows:

"The defendant relies most strongly upon *Chanler* v. *Kelsey*, (205 U. S. 466). The question considered there, however, was not whether the exercise of such a power of appointment was a transfer of the donee's estate within the meaning of a law such as that now under consideration, but whether it was an act upon which a state could lay a succession tax without violation of the Fourteenth Amendment and without impairing the obligation of a contract. By the law of the State of New York there construed it was declared that the exercise of the power of appointment should be 'deemed a transfer' taxable as though the property belonged to the donee. The Court of Appeals of New York had held that the tax was laid upon the exercise of the power of appointment by will 'as an effective transfer for the purposes of the act.' At page 478 of 205 U. S., the Supreme Court say:

'As in *Orr* v. *Gilman*, 183 U. S., *supra*, we must accept this decision of the New York Court of Appeals holding that it is the exercise of the power which is the essential thing to transfer the estates upon which the tax is imposed. That power was exercised under the will of Laura Delano, a right which was conferred upon her under the laws of the State of New York and for the exercise of which the statute was competent to impose the tax in the exercise of the sovereign power of the legislature over the right to make a disposition of property by will.'

"Upon reflection it seems clear that the conclusion there reached was not that the execution of a power was generally to be deemed a transfer or conveyance for all purposes or that the estate appointed was to be deemed that of the donee, generally speaking, but that, for some purposes, the execution of the power does constitute a transfer so as to warrant the legislature of a state to declare it such for the purposes of taxation. I do not understand that decision to abrogate the general rule of the common law, but to hold that a state may properly do so by statute. The statute now

under consideration, therefore, must be construed in the light of the common law."

However the question of the exercise of a power of appointment may be regarded, there is therein no analogy to the case at bar where no power of appointment is involved, but where it is plain that the transfer of the remainders was complete and vested in the transferees when made in 1901 and that the subsequent taking of possession on the falling in of the life estate could not alter or affect the completeness of the original transfer creating vested remainders.

VI.

As to the claim of the Goverment below that the act of September 8, 1916, should be construed to impose a tax upon the transfer of the assets of which the decedent died possessed measured by the value, not only of those assets, but also of all those which he at any time transferred in contemplation of death or to take effect in enjoyment or possession at or after death.

The third theory urged by the Government below was that the statute does not tax past transfers, as such, but only the transfer of the net estate of the decedent at death, but that the measure of the tax is the value of the estate left by the decedent plus the value of all the transfers made by him during life in contemplation of death or to take effect in enjoyment or possession at or after death. This contention cannot, however, be reconciled either with the language or purpose of the statute, and, if adopted, would give rise to arbitrary results and grave constitutional difficulties.

It is patent on the face of the argument that it leads to an absurd consequence which Congress never could have intended. Under it, an individual dying without any estate would not be taxable at all; and that would have to follow even if he had only shortly before his death transferred away all his property in contemplation of his imminent demise and for the very purpose of evading the tax. But "a bad result suggests a wrong construction" (*People ex rel. Beaman* v. *Feitner,* 168 N. Y. 360, 366); and so, too, must the Government itself have believed, for it refused to abide by the logical outcome of its own contention when, in *Levy* v. *Wardell* (now pending in this court), it appeared that the decedent had left no estate at death. Notwithstanding that fact, the Government insisted on taxing the transferees in that case because they had received a gift in contemplation of death. The district judge in *Shwab* v. *Doyle* (also now pending in this court), sustained the Government in its so-called "measurement" argument, but the Circuit Court of Appeals, which affirmed the decision (269 Fed. 321), was careful to avoid adopting this contention (p. 327), and no other court has accepted it since.

To apply it at all, it is first necessary to hold that the words "the net estate" in section 201 of the act are used in two quite different senses when twice employed in the same section and sentence only eighteen words apart. The section reads as follows:

> "A tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of *the net estate,* to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of *the net estate* of every decedent dying after the passage of this Act."

Thus, under the Government's contention, it is a prerequisite of the argument to assert that the value of "the net estate" whose transfer is taxed in this sentence is different from the value of "the net estate" which is made the measure of the tax therein. In other words, that "the net estate" whose transfer is taxed is limited to the estate of which the decedent died possessed, while "the net estate" whose value measures the tax includes the estate being transferred as well all property which the decedent gave away in his lifetime in contemplation of death or to take effect in enjoyment and possession at or after death.

It is, of course, possible for the same words not to mean the same thing in different parts of an enactment (*Towne* v. *Eisner*, 245 U. S. 418, 425), but that is not the normal case. *Prima facie* the same words have the same meaning throughout an act, and certainly that should be deemed to be the case where the repetition of them occurs in the same sentence and in close proximity. *United States* v. *Central Pac. R. R. Co.*, 118 U. S. 235, 240; *Mangam* v. *City of Brooklyn*, 98 N Y. 585, 592; *Case of Gagnon*, 228 Mass. 334, 338; *Ryan* v. *State*, 174 Ind. 468, 474; *State Public Utilities Commission* v. *Early*, 285 Ill. 469, 474; *In re Jackson*, 40 Fed. 372, 374; 2 Sutherland on Statutory Construction, p. 758. Different meanings should, of course, not be assigned to the same phrase of a law merely in order to accomplish injustice and oppression.

But the argument is in plain conflict with other provisions of the act itself. Thus, in section 209 it is provided that:

> "If the decedent makes a transfer of, or creates a trust with respect to, any property in contem-

> plation of or intended to take effect in possession or enjoyment at or after his death . . . *and if the tax in respect thereto* is not paid when due, the transferee or trustee shall be personally liable for such tax," etc.

It will be observed that this passage expressly refers to a tax in respect of transfers in contemplation of death or to take effect in possession or enjoyment at or after death. But under the Government's contention there is no such tax; the tax is solely in respect of the transfer of the estate remaining at death, and only the measure of this tax has to do with anything else. The Government's argument, therefore, would practically nullify the above quoted words in section 209, "the tax in respect thereto," which plainly mean the tax in respect to transfers in contemplation of or to take effect in enjoyment or possession at or after death.

Again, if the tax were in fact levied only upon the transfer of the assets left by a decedent at death, the tax would have been made payable by the estate alone in any event. The act, however, makes the transferee who received a transfer during the life of the decedent secondarily liable in certain circumstances and imposes a lien upon his property for the tax. No justification in reason exists for that course, if the only transfer taxed is that of the decedent's estate which takes place at his death. The donee of a gift in contemplation of death has no interest in the transfer of the decedent's estate, which is the sole source of the tax under the Government's theory, and he ought not, therefore, to have any responsibility therefor. To subject the donee to personal liability and his property to a lien for the payment of a tax due from the donor's estate upon the transfer of such estate at the

latter's death, as does the act in suit, is to make the donee pay the former owner's tax. Such a procedure is not the exercise of taxation at all (Cooley on Taxation, 7th ed., p. 695); it is plainly compelling one man to pay another's tax in respect of a matter in which he has no concern. The fact that the donee's property is the measure of the tax, even if it be true, is immaterial, for the Government's right to appropriate the donee's property certainly cannot result from using his property as a standard or measure of another's tax.

The Government's measurement theory necessarily presents grave constitutional objections. It is, of course, quite proper to measure a transfer tax by the value of the property transferred. There is in that case a reasonable relation between the tax and its measure, even though some of the property transferred be not taxable as such. *Keeney* v. *New York*, 222 U. S. 525, 534. In such a case a non-taxable element in the measure may be there merely incidentally and not because of any effort of the Government to tax it in effect and by indirection, or arbitrarily. If the latter were the case, the tax would be clearly void. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 163; *McCoach* v. *Minehill Ry. Co.*, 228 U. S. 295, 307; *Maxwell* v. *Bugbee*, 250 U. S. 525, 539-40; *Wallace* v. *Hines*, 253 U. S. 66, 68-70. To measure the tax upon the privilege of doing business in corporate form by the income derived from such business, even though part of that income springs from non-taxable securities, is justifiable; there is an obvious relation between the doing of business and the income of such business, and the non-taxables are not in that case being taxed in fact or by subterfuge. They relate to and benefit the business in-

directly, and are to an extent indirectly reflected in its income.

But to tax the transfer of the assets left by a decedent and to measure the tax, not merely by the value of those assets, but by the value also of what the decedent gave away in his lifetime, is quite a different matter. These prior transfers have no substantial relation to the transfer of the decedent's actual estate at death. They are distinct and disassociated transactions which took place perhaps many years before and with quite different parties. Their inclusion in the measure of the tax is thus not merely incidental to the application of an appropriate measure, but wholly arbitrary. It is, moreover, a covert attempt in effect to tax those past transfers, which cannot be done by unapportioned taxation. The case is, therefore, analogous to that of *Wallace* v. *Hines*, 253 U. S. 66, where an effort was made by a state in effect to tax interstate commerce under the guise of a tax upon local commerce measured in such a way as directly to reach interstate commerce. In condemning this attempt, the court said (pp. 68-70):

> "It will be seen that (the tax act) purports to be a special excise tax upon doing business in the State. As the law is administered, the tax commissioner fixes the value of the total property of each railroad by the total value of its stocks and bonds and assesses the proportion of this value that the main track mileage in North Dakota bears to the main track of the whole line. But on the allegations of the bill, which is all that we have before us, the circumstances are such as to make that mode of assessment indefensible. North Dakota is a state of plains, very different from the other states, and the cost of the roads there was

much less than it was in mountainous regions that the roads had to traverse. The State is mainly agricultural. Its markets are outside its boundaries and most of the distributing centers from which it purchases also are outside. It naturally follows that the great and very valuable terminals of the roads are in other States. So looking only to the physical track the injustice of assuming the value to be evenly distributed according to main track mileage is plain. But that is not all.

"The only reason for allowing a State to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess. The purpose is not to expose the heel of the system to a mortal dart—not, in other words, to open to taxation what is not within the state. Therefore, no property of such an interstate road situated elsewhere can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the state. Hence, the possession of bonds secured by mortgage of lands in other states, or of a land-grant in another state or of other property that adds to the riches of the corporation but does not affect the North Dakota part of the road is no sufficient ground for the increase of the tax—whatever it may be—whether a tax on property, or, as here, an excise upon doing business in the State. *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350, 364. In this case, it is alleged, the tax commissioner's valuation included items of the kind described to very large amounts. The foregoing considerations justify the preliminary injunction that was granted against what would appear to be an unwarranted interference with interstate commerce and a taking of property without due process of law. *Fargo* v. *Hart*, 193 U. S. 490. *Union Tank Line Co.* v. *Wright*, 249 U. S. 275, 282."

There is no support for the Government's contention in the case of *Maxwell* v. *Bugbee*, 250 U. S. 525. The New Jersey taxing act there involved did not include in what it actually taxed any of the property of the non-resident decedent which was in other states. But in the case at bar, the Government seeks to have its measurement theory accomplish a very different result. It would add the value of the property transferred *inter vivos* to the value of that which passes at death (which it alleges is the only thing actually being taxed), and then, would not only fix the rate by the total, but also apply that rate to the total itself, that is, to the sum of all the transfers.

The difference between the New Jersey tax and the tax now before the court may be illustrated by the following example: A non-resident leaves property in New Jersey, not specifically disposed of, amounting to \$50,000. There are other assets elsewhere, also not specifically disposed of, amounting to \$950,000. The New Jersey taxing authorities compute what their tax would have been if the entire \$1,000,000 had been located in New Jersey and the decedent had been a resident. The rate thus obtained—say, five per cent—is then applied only to the \$50,000 assets actually located in New Jersey and the tax accordingly fixed at \$2,500.

Let us contrast with the above the operation of the act of Congress of September 8, 1916, under the Government's measurement theory. A decedent dies possessed of assets amounting to \$50,000. Fifteen years before his death he had transferred property amounting to \$950,000, but reserved a life estate. The act of Congress adds the

two amounts together, makes a total net estate of $1,000,000, and fixes the rate of the tax accordingly, at, say, five per cent. It would not, however, apply the five per cent rate solely to the assets possessed at death, but would apply it to the aggregate amount of $1,000,000, and fix the tax not at $2,500, but at $50,000. This indicates how oppressively the tax in suit might operate and how the tax liability of A's estate would be measured by the value of property belonging to third parties.

VII.

As to the power of Congress to levy taxes retroactively.

As has been shown in point II, the state courts have recognized that a transfer tax on past transfers is in substance and effect either a direct or property tax if imposed upon the transferee, or an unwarranted and arbitrary attempt to tax if imposed upon the transferor for having made a transfer long before the enactment of the tax statute. It is true that a limited measure of retroactivity in respect of certain taxes has been upheld because reasonable and practically necessary in view of the nature of certain particular taxes and their incidence. None of these taxes heretofore sustained have, however, involved any such unlimited retroactivity and reaching back into the past as that which the Government must here contend for. *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1; *Stockdale* v. *Insurance Companies*, 20 Wall. 323. As stated in Black's Income and Federal Tax Laws (sec. 56, p. 67):

> "On general principles and irrespective of explicit constitutional limitations, a statute imposing

an income tax may subject to taxation the income of the citizen for the whole of the current year in which the statute is passed, that is, not only so much of the income as accrued from the date of the enactment of the law to the end of the year, but also that portion which accrued or was earned from the beginning of the year to the date of the law. For the year's income is treated and considered as one entire thing, not as made up of several portions or items. And hence, although the statute might be called retrospective in its operation upon a part of the first year's income, it is not retrospective in such a sense as to render it unconstitutional."

This retroactive feature of the act of October 3, 1913 (38 Stat. 166), was characterized by Mr. Chief Justice White in *Brushaber* v. *Union Pacific Railroad Co.*, 240 U. S. 1, 20, as "limited retroactivity."

The case at bar is not analagous to one in which a tax is imposed upon a continuing process or transaction, such as importations not yet completed, or holding tobacco for sale (*Patton* v. *Brady*, 184 U. S. 608), or using a foreign-built yacht (*Billings* v. *United States*, 232 U. S. 261). There is no necessary retroactivity in such cases, even though the process or transaction taxed was initiated or commenced at a time prior to the act. The process or transaction is still continuing and incomplete, and thus affords a basis for taxation.

Quite different, however, are taxes imposed, not for recurrent periods like an income tax, or on continuing processes or transactions like those just referred to, but upon the occurrence of a particular act or event. In such cases, if the act is not done or event does not occur after the tax is enacted or while it is in force, there is nothing upon which the tax can be incident. A past act or event

is a mere matter of history and not an occasion or occurrence upon which valid taxation may be imposed. "Where there is no transfer, there is no tax, and a transfer made before the passage of the act relating to taxable transfers is not affected by it" (*Matter of Lansing*, 182 N. Y. 238, 247).

Where state taxation has heretofore been involved, the courts, as we have seen above (point II), have regarded a tax upon a past transfer as void for want of due process of law, among other reasons. The basis of such a finding was that there was no transfer to tax, precisely to all intents and purposes as if a tax were imposed on property which no longer existed or which the taxpayer no longer owned. The inquiry, therefore, naturally arises, Why is not a federal tax upon a past transfer equally lacking in the element of due process of law? The federal power over successions or transfers at or because of death is certainly no larger than that of the states. Indeed, it was said by the minority in *Chanler v. Kelsey*, 205 U. S. 466, 479, and apparently not challenged by the members of the majority, that the power of the several states to tax such successions or transfers was at least as great as the power of the National Government. Certainly, the act or event or occasion is as much past and non-existent in the one case as in the other, and certainly the impairment and interference with antecedent vested rights is as far-reaching, objectionable and oppressive, whether it be the work of one of the several states or of the United States. *Choate v. Trapp*, 224 U. S. 665; *Osborn v. Nicholson*, 13 Wall. 654, 662. In other words, the fundamental arbitrariness of such an exertion of legislative power is the same, quite irrespec-

tive of whether it is an attempted exercise of legislative power by a state legislature or by Congress; and it would seem logically to follow that an attempt by Congress to tax a transfer as such when such transfer had been made and completed long before the taxing statute was passed, would constitute an attempt to tax something that had no present existence, and as such would be a violation of the Fifth Amendment, precisely as it would be a violation of the Fourteenth Amendment if enacted by a state legislature. Equally arbitrary, whether the tax was a state or a federal tax, would be the taxation of A's estate by reason of a long past transfer and measuring the tax thereon by the then value of the transferred property belonging to B, or taxing the transfer of the estate of A upon the basis of the then value of property belonging to B.

But it is asserted that it has been declared in opinions of this court that the Fifth Amendment does not in any way apply to the federal taxing power. Passing, for the moment, the expressions upon that point to be found in some of the opinions of this court, it is submitted that it is difficult to perceive any valid reason for such an extreme doctrine. It is true that the power to tax is broadly granted and that the degree or extent of its exercise in proper cases is within the discretion of Congress; but it is to be observed that the power is granted in and by the same instrument which contains the equally broad limitations upon all exercise of governmental powers; and it is well settled that:

> "The Constitution of the United States, with the several amendments thereof must be regarded as one instrument, all of whose provisions are to be deemed of equal validity, . . . [and that]

> it is one of the important functions of this court to so interpret the various provisions and limitations contained in the organic laws of the Union that each and all shall be respected and observed" (*Prout* v. *Starr*, 188 U. S. 537, 543, 544).

Thus, the war power conferred upon the United States by the Constitution is as broadly granted as the taxing power and as essential; but it is, nevertheless, the established doctrine of this court that even the war power is subject to the guaranties contained in the Constitution, including those embraced in the Fifth Amendment. *Ex parte Milligan*, 4 Wall. 2, 121-7; *United States* v. *Russell*, 13 Wall. 623, 627; *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 155, 156; *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 88. If there were any power of the National Government which ought not to be subject to the operation of the guaranty in favor of due process of law, it would be natural to suppose that the exigent and highly essential war power would be that power. But, as the authorities cited above show, not even the apparent and imperative demands of war have been deemed sufficient warrant for placing the war power above the guaranty to the citizen of due process of law and the protection of his property against being taken for public use without just compensation.

Why, then, should the tax power be thus singled out and practically placed above the Constitution? It is not merely the power to destroy, but the power most likely to be abused if wholly unlimited. The Constitution, of course, does not provide that "the Congress shall have power to lay and collect taxes, duties, imposts, and excises without regard to the guaranty of due process of law or to the prohibition against taking private property

for public use without just compensation." Neither does the Fifth Amendment declare that "no person shall . . . be deprived of property, without due process of law, except in and by means of exactions called taxes, duties, imposts, or excises." Nor does the amendment provide that "private property shall not be taken for public use without just compensation, except under the claim of the exercise of the power to lay and collect taxes, duties, imposts and excises." It is manifest, therefore, that there is nothing in the text of the Constitution which requires the disregard of otherwise applicable guaranties intended as a protection against arbitrary exercises of power; and it is not to be assumed that any such effect was in the minds of the framers, familiar, as they were, with the influence and operation of oppressive and arbitrary taxation in welding the separate colonies into an independent nation, and familiar also with the apprehensions then entertained that the new national government, about to be formed, might, if not restricted by the then proposed constitutional amendments, in time, also transgress the bounds of just governmental authority.

It should also be borne in mind that this court has never upheld an arbitrary exercise of the federal taxing power, although it has declined to interfere with the discretion of Congress as to the degree or extent of taxation in permissible cases. If the exaction is really a tax and imposed upon or in respect of a taxable subject matter, then the extent or degree of the tax is not subject to review by the courts; but this conceded doctrine by no means prevents investigation as to the true nature and effect of the alleged tax. Carefully distinguishing *dicta* from the points actually decided, it will be found on

examination that every congressional tax sustained by this court was, in fact, an exercise of the power to tax and not a volation of any requirement of due process of law and that the real objection urged was as to the degree of the tax and some alleged collateral purpose sought to be accomplished thereby. In each case it was a tax upon a subject matter within the taxing power.

Even when it has been suggested that the federal taxing power was not subject to the limitations in the Fifth Amendment, the court disclaimed any intent to license arbitrary or unwarranted taxation by Congress. Thus, for example, in *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, 24, while the court declared that the due process clause "is not a limitation upon the taxing power conferred upon Congress by the Constitution," it, nevertheless, added that:

> "This doctrine would have no application in a case where although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment, or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion."

And in *Knowlton* v. *Moore*, 178 U. S. 41, 77, the court similarly declared that "aside from express constitutional restrictions," such arbitrary taxation would "transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems."

With all deference, it is submitted that, at least so far as the power of taxation in the case at bar is con-

cerned, those necessary guaranties against arbitrary and confiscatory taxation, which this court has thus recognized and affirmed, are fully embraced in the express prohibitions contained in the Fifth Amendment. In a word, the amendment condemns whatever exactions are not authorized by the taxing power granted in the Constitution. An unapportioned direct tax, for example, or an exaction or demand which is not in its nature a tax at all but an imposition on a selected class and arbitrarily measured, is but an attempt to take private property without due process of law and without just compensation. The limitations of the Fifth Amendment, as the First Congress stated in the preamble to the resolution which proposed the first ten amendments to the Constitution, were inserted "in order to prevent misconstruction or abuse of its powers," and for the purpose of adding "declaratory and restrictive clauses" (1 Stat. 97; Rev. Stat., p. 28, note). The express limitations in the Fifth Amendment are of themselves adequate to prevent the arbitrary exercise of power referred to in the foregoing extracts from the *Knowlton* and *Brushaber* cases, and it would, therefore, appear to be unnecessary to resort to any such implied limitations as are mentioned in the opinions in those cases.

It is further submitted that the applicability of the Fifth Amendment to the taxing power of Congress is not excluded by asserting that the Constitution does not in one clause withdraw a power which it confers in another. If that argument were valid, none of the powers granted to Congress in the Constitution would be in any way limited by the Fifth Amendment, and the war power, for example, would be entirely free of all the requirements

of due process of law—a contention which this court has repudiated. The Fifth Amendment comes into play, not as a restriction on the grant of power to tax, but as a prohibition upon the exercise of that power in a manner not intended to be authorized or under the guise or pretense of a tax. The grant to Congress of power to make war is obviously not withdrawn by the guaranty to the individual of due process of law in the exercise of the war power; but its exercise is directed to be in consonance with the private rights of the people so far as the circumstances will permit. In each instance, the grant and the limitation are given full force and each can be given due application and effect without nullifying the other.

It would certainly seem anomalous to hold, on the one hand, that Congress may lay and collect taxes without regard to the guaranties of due process of law and the taking of private property for public use without just compensation, and yet, on the other hand, hold that, nevertheless, if it shall attempt to exercise the power to tax without due process or just compensation some implied constitutional limitation will protect against the exercise of any such arbitrary power. The difference in opinion upon this score, it is submitted, would, in fact, be only one of mere words. Both views are, in final analysis, the same in practical effect and result. But it is submitted that the sounder view is that the express guaranties of the Fifth Amendment are in fact applicable and sufficient to prohibit unwarranted and arbitrary exactions, without recourse to general implications assumed to arise from the nature of our government.

If once it be concluded that the tax in suit in the case at bar is an unauthorized exaction under the guise of a tax, it should be as such plainly subject to the constitutional prohibitions against taking private property without due process of law, or for public use without just compensation, and it should follow that the act of September 8, 1916, offends against both **guaranties.** A state transfer tax upon a past transfer has, as we have seen (point II), been declared in violation of similar provisions in state constitutions and in the Fourteenth Amendment; and "if any different meaning of the same words, as they are used in the [Fifth and the] Fourteenth Amendment, can be conceived, none has yet appeared in judicial decision." *Twining* v. *New Jersey*, 211 U. S. 78, 100-1. See also *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401, 410, and *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324, 355.

Conclusion.

For the reasons above discussed, it is submitted that the Federal Estate Tax Law of September 8, 1916, should not be construed as intended to operate retroactively so as to tax a decedent's estate upon the present value of transfers made by him and vested in the transferees many years before the enactment of the tax law; but, if it should be so construed, that then it would constitute in substance and effect an unapportioned direct tax upon a decedent's estate, or else an arbitrary exaction under the guise of a tax, and in either of such aspects be un-

constitutional. The judgment of the court below was, therefore, erroneous and should be reversed.

Washington, D. C., April 10, 1922.

William D. Guthrie,
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E. S. Heller,
Isaac Frohman,
Bernard Hershkopf,
Of counsel for plaintiffs-in-error.

Supreme Court of the United States

OCTOBER TERM, 1921
No. 236

UNION TRUST COMPANY OF SAN FRANCISCO and ALBERT LACHMAN, AS EXECUTORS OF HENRIETTE S. LACHMAN, DECEASED,
Plaintiffs-in-error,

v.

JUSTUS S. WARDELL, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF CALIFORNIA, ET AL.,
Defendants-in-error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

APPENDIX TO BRIEF ON BEHALF OF THE PLAINTIFFS-IN-ERROR.

INDEX

APPENDIX.

PROVISIONS OF THE ESTATE TAX ACTS OF 1916, 1917 AND 1919.

ESTATE TAX LAW OF 1916 (REVENUE ACT OF 1916, TITLE II, 39 STAT. 777).

SEC. 200. That when used in this title—

The term "person" includes partnerships, corporations, and associations;

The term "United States" means only the States, the Territories of Alaska and Hawaii, and the District of Columbia;

The term "executor" means the executor or administrator of the decedent, or, if there is no executor or administrator, any person who takes possession of any property of the decedent; and

The term "collector" means the collector of internal revenue of the district in which was the domicile of the decedent at the time of his death, or, if there was no such domicile in the United States, then the collector of the district in which is situated the part of the gross estate of the decedent in the United States, or, if such part of the gross estate is situated in more than one district, then the collector of internal revenue at Baltimore, Maryland.

SEC. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages

of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or non-resident of the United States:

One per centum of the amount of such net estate not in excess of $50,000;

Two per centum of the amount by which such net estate exceeds $50,000 and does not exceed $150,000;

Three per centum of the amount by which such net estate exceeds $150,000 and does not exceed $250,000;

Four per centum of the amount by which such net estate exceeds $250,000 and does not exceed $450,000;

Five per centum of the amount by which such net estate exceeds $450,000 and does not exceed $1,000,000;

Six per centum of the amount by which such net estate exceeds $1,000,000 and does not exceed $2,000,000;

Seven per centum of the amount by which such net estate exceed $2,000,000 and does not exceed $3,000,000;

Eight per centum of the amount by which such net estate exceeds $3,000,000 and does not exceeed $4,000,000;

Nine per centum of the amount by which such net estate exceeds $4,000,000 and does not exceed $5,000,000; and

Ten per centum of the amount by which such net estate exceeds $5,000,000.

Sec. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is

subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate.

(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; and

(c) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent.

For the purpose of this title stock in a domestic corporation owned and held by a non-resident decedent shall be deemed property within the United States, and any property of which the decedent has made a transfer or with respect to which he has created a trust, within the meaning of subdivision (b) of this section, shall be deemed to be situated in the United States, if so situated either at the time of the transfer or the creation of the trust, or at the time of the decedent's death.

Sec. 203. That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate, arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise, support during the settlement of the estate of those dependent upon the decedent, and such other charges against the estate, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered; and

(2) An exemption of $50,000;

(b) In the case of a non-resident, by deducting from the value of that part of his gross estate which at the time of his death is situated in the United States that proportion of the deductions specified in paragraph (1) of subdivision (a) of this section which the value of such part bears to the value of his entire gross estate, wherever situated. But no deductions shall be allowed in the case of a non-resident unless the executor includes in the return required to be filed under section two hundred and five the value at the time of his death of that part of the gross estate of the non-resident not situated in the United States.

Section 204. That the tax shall be due one year after the decedent's death. If the tax is paid before it is due a discount at the rate of five per centum per annum,

calculated from the time payment is made to the date when the tax is due, shall be deducted. If the tax is not paid within ninety days after it is due interest at the rate of ten per centum per annum from the time of the decedent's death shall be added as part of the tax, unless because of claims against the estate, necessary litigation, or other unavoidable delay the collector finds that the tax cannot be determined, in which case the interest shall be at the rate of six per centum per annum from the time of the decedent's death until the cause of such delay is removed, and thereafter at the rate of ten per centum per annum. Litigation to defeat the payment of the tax shall not be deemed necessary litigation.

Sec. 205. That the executor, within thirty days after qualifying as such, or after coming into possession of any property of the decedent, whichever event first occurs, shall give written notice thereof to the collector. The executor shall also, at such times and in such manner as may be required by the regulations made under this title, file with the collector a return under oath in duplicate, setting forth (a) the value of the gross estate of the decedent at the time of his death, or, in case of a non-resident, of that part of his gross estate situated in the United States; (b) the deductions allowed under section two hundred and three (c) the value of the net estate of the decedent as defined in section two hundred and three; and (d) the tax paid or payable thereon; or such part of such information as may at the time be ascertainable and such supplemental data as may be necessary to establish the correct tax.

Return shall be made in all cases of estate subject to the tax or where the gross estate at the death of the

decedent exceeds $60,000, and in the case of the estate of every non-resident any part of whose gross estate is situated in the United States. If the executor is unable to make a complete return as to any part of the gross estate of the decedent, he shall include in his return a description of such part and the name of every person holding a legal or beneficial interest therein, and upon notice from the collector such person shall in like manner make a return as to such part of the gross estate. The Commissioner of Internal Revenue shall make all assessments of the tax under the authority of existing administrative special and general provisions of law relating to the assessment and collection of taxes.

Sec. 206. That if no administration is granted upon the estate of a decedent, or if no return is filed as provided in section two hundred and five, or if a return contains a false or incorrect statement of a material fact, the collector or deputy collector shall make a return and the Commissioner of Internal Revenue shall assess the tax thereon.

Sec. 207. That the executor shall pay the tax to the collector or deputy collector. If for any reason the amount of the tax cannot be determined, the payment of a sum of money sufficient, in the opinion of the collector, to discharge the tax shall be deemed payment in full of the tax, except as in this section otherwise provided. If the amount so paid exceeds the amount of the tax as finally determined, the Commissioner of Internal Revenue shall refund such excess to the executor. If the amount of the tax as finally determined exceeds the amount so paid the commissioner shall notify the executor of the amount of such excess. From the time of such

notification to the time of the final payment of such excess part of the tax, interest shall be added thereto at the rate of ten per centum per annum, and the amount of such excess shall be a lien upon the entire gross estate, except such part thereof as may have been sold to a bona fide purchaser for a fair consideration in money or money's worth.

The collector shall grant to the person paying the tax duplicate receipts, either of which shall be sufficient evidence of such payment, and shall entitle the executor to be credited and allowed the amount thereof by any court having jurisdiction to audit or settle his accounts.

Sec. 208. That if the tax herein imposed is not paid within sixty days after it is due, the collector shall, unless there is reasonable cause for further delay, commence appropriate proceedings in any court of the United States, in the name of the United States, to subject the property of the decedent to be sold under the judgment or decree of the court. From the proceeds of such sale the amount of the tax, together with the costs and expenses of every description to be allowed by the court, shall be first paid, and the balance shall be deposited according to the order of the court, to be paid under its direction to the person entitled thereto. If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose

interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.

Sec. 209. That unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien.

If the decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a bona fide sale for a fair consideration in money or money's worth) and if the tax in respect thereto is not paid when due, the transferee or trustee shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for a fair consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a bona fide purchaser for a fair consideration in money or money's worth.

Sec. 210. That whoever knowingly makes any false statement in any notice or return required to be filed by this title shall be liable to a penalty of not exceeding

$5,000, or imprisonment not exceeding one year, or both, in the discretion of the court.

Whoever fails to comply with any duty imposed upon him by section two hundred and five, or, having in his possession or control any record, file, or paper, containing or supposed to contain any information concerning the estate of the decedent, fails to exhibit the same upon request to the Commissioner of Internal Revenue or any collector or law officer of the United States, or his duly authorized deputy or agent, who desires to examine the same in the performance of his duties under this title, shall be liable to a penalty of not exceeding $500, to be recovered, with costs of suit, in a civil action in the name of the United States.

Sec. 211. That all administrative, special and general provisions of law, including the laws in relation to the assessment and collection of taxes, not heretofore specifically repealed are hereby made to apply to this title so far as applicable and not inconsistent with its provisions.

Sec. 212. That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make such regulations, and prescribe and require the use of such books and forms, as he may deem necessary to carry out the provisions of this title.

Amendment to Estate Tax Law of 1916 by Act of March 3, 1917 (39 Stat. 1002).

Sec. 300. That section two hundred and one, Title II, of the Act entitled "An Act to increase the revenue, and for other purposes", approved September eighth, nineteen hundred and sixteen, be, and the same is hereby, amended to read as follows:

Section 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or non-resident of the United States:

[Here following rates of taxation.]

Sec. 301. That the tax on the transfer of the net estate of decedents dying between September eighth, nineteen hundred and sixteen, and the passage of this Act shall be computed at the rates originally prescribed in the Act approved September eighth, nineteen hundred and sixteen.

Estate Tax Law of 1917 (40 Stat. 324).

Sec. 900. That in addition to the tax imposed by section two hundred and one of the Act entitled "An Act to increase the revenue, and for other purposes," approved September eighth, nineteen hundred and sixteen, as amended—

(a) A tax equal to the following percentages of its value is hereby imposed upon the transfer of each net estate of every decedent dying after the passage of this Act, the transfer of which is taxable under such section (the value of such net estate to be determined as provided in Title II of such Act of September eighth, nineteen hundred and sixteen):

[Here follow rates of taxation.]

Sec. 901. That the tax imposed by this title shall not apply to the transfer of the net estate of any decedent

dying while serving in the military or naval forces of the United States, during the continuance of the war in which the United States is now engaged, or if death results from injuries received or disease contracted in such service, within one year after the termination of such war. For the purposes of this section the termination of the war shall be evidenced by the proclamation of the President.

ESTATE TAX LAW OF 1919 (REVENUE ACT OF FEB. 24, 1919, TITLE IV, 40 STAT. 1057, 1096).

SEC. 400. That when used in this title—

The term "executor" means the executor or administrator of the decedent, or, if there is no executor or administrator, any person who takes possession of any property of the decedent; and

The term "collector" means the collector of internal revenue of the district in which was the domicile of the decedent at the time of his death, or, if there was no such domicile in the United States, then the collector of the district in which is situated the part of the gross estate of the decedent in the United States, or, if such part of the gross estate is situated in more than one district, then the collector of internal revenue of such district as may be designated by the Commissioner.

SEC. 401. That (in lieu of the tax imposed by Title II of the Revenue Act of 1916, as amended, and in lieu of the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage

of this Act, whether a resident or non-resident of the United States:

[Here follow rates of taxation.]

The taxes imposed by this title or by Title II of the Revenue Act of 1916 (as amended by the Act entitled "An Act to provide increased revenue to defray the expenses of the increased appropriations for the Army and Navy and the extensions of fortifications, and for other purposes," approved March 3, 1917) or by Title IX of the Revenue Act of 1917, shall not apply to the transfer of the net estate of any decedent who has died or may die while serving in the military or naval forces of the United States in the present war or from injuries received or disease contracted while in such service, and any such tax collected upon such transfer shall be refunded to the executor.

Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

(b) To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, courtesy, or by virtue of a statute creating an estate in lieu of dower or courtesy;

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with r-

spect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

(d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent;

(e) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for a fair consideration in money or money's worth; and

(f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

Sec. 403. That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, or from theft, when such losses are not compensated for by insurance or otherwise, and such amounts reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered, but not including any income taxes upon income received after the death of the decedent, or any estate, succession, legacy, or inheritance taxes;

(2) An amount equal to the value at the time of the decedent's death of any property, real, personal, or mixed, which can be identified as having been received by the decedent as a share in the estate of any person who died within five years prior to the death of the decedent, or which can be identified as having been acquired by the decedent in exchange for property so received, if an estate tax under the Revenue Act of 1917 or under this Act was collected from such estate, and if such property is included in the decedent's gross estate;

(3) The amount of all bequests, legacies, devises, or gifts, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to

or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes. This deduction shall be made in case of the estates of all decedents who have died since December 31, 1917; and

(4) An exemption of $50,000;

(b) In the case of a non-resident, by deducting from the value of that part of his gross estate which at the time of his death is situated in the United States—

(1) That proportion of the deductions specified in paragraph (1) of subdivision (a) of this section which the value of such part bears to the value of his entire gross estate, wherever situated, but in no case shall the amount so deducted exceed 10 per centum of the value of that part of his gross estate which at the time of his death is situated in the United States;

(2) An amount equal to the value at the time of the decedent's death of any property, real, personal, or mixed, which can be identified as having been received by the decedent as a share in the estate of any person who died within five years prior to the death of the decedent, or which can be identified as having been acquired by the decedent in exchange for property so received, if an estate tax under the Revenue Act of 1917 or under this Act was collected from such estate, and if such property is included in that part of the decedent's gross estate which at the time of his death is situated in the United States; and

(3) The amount of all bequests, legacies, devises, or gifts, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any domestic corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, sicentific, literary, or educational purposes within the United States. This deduction shall be made in case of the estates of all decedents who have died since December 31, 1917; and

No deduction shall be allowed in the case of a non-resident unless the executor includes in the return required to be filed under section 404 the value at the time of his death of that part of the gross estate of the non-resident not situated in the United States.

For the purpose of this title stock in a domestic corporation owned and held by a non-resident decedent, and the amount receivable as insurance upon the life of a non-resident decedent where the insurer is a domestic corporation, shall be deemed property within the United States, and any property of which the decedent has made a transfer or with respect to which he has created a trust, within the meaning of subdivision (c) of section 402, shall be deemed to be situated in the United States, if so situated either at the time of the transfer or the creation of the trust, or at the time of the decedent's death.

In the case of any estate in respect to which the tax under existing law has been paid, if necessary to allow the benefit of the deduction under paragraph (3) of subdivision (a) or (b) the tax shall be redetermined and any excess of tax paid shall be refunded to the executor.

Sec. 404. That the executor, within sixty days after qualifying as such, or after coming into possession of any property of the decedent, whichever event first occurs, shall give written notice thereof to the collector. The executor shall also, at such times and in such manner as may be required by regulations made pursuant to law, file with the collector a return under oath in duplicate, setting forth (a) the value of the gross estate of the decedent at the time of his death, or, in case of a non-resident, of that part of his gross estate situated in the United States; (b) the deductions allowed under section 403; (c) the value of the net estate of the decedent as defined in section 403; and (d) the tax paid or payable thereon; or such part of such information as may at the time be ascertainable and such supplemental data as may be necessary to establish the correct tax.

Return shall be made in all cases where the gross estate at the death of the decedent exceeds $50,000, and in the case of the estate of every non-resident any part of whose gross estate is situated in the United States. If the executor is unable to make a complete return as to any part of the gross estate of the decedent, he shall include in his return a description of such part and the name of every person holding a legal or beneficial interest therein, and upon notice from the collector such person shall in like manner make a return as to such part of the gross estate. The Commissioner shall make all assess-

ments of the tax under the authority of existing administrative special and general provisions of law relating to the assessment and collection of taxes.

Sec. 405. That if no administration is granted upon the estate of a decedent, or if no return is filed as provided in section 404, or if a return contains a false or incorrect statement of a material fact, the collector or deputy collector shall make a return and the Commissioner shall assess the tax thereon.

Sec. 406. That the tax shall be due one year after the decedent's death; but in any case where the Commissioner finds that payment of the tax within one year after the decedent's death would impose undue hardship upon the estate, he may grant an extension of time for the payment of the tax for a period not to exceed three years from the due date. If the tax is not paid within one year and 180 days after the decedent's death, interest at the rate of 6 per centum per annum from the expiration of one year after the decedent's death shall be added as part of the tax.

Sec. 407. That the executor shall pay the tax to the collector or deputy collector. If the amount of the tax can not be determined, the payment of a sum of money sufficient, in the opinion of the collector, to discharge the tax shall be deemed payment in full of the tax, except as in this section otherwise provided. If the amount so paid exceeds the amount of the tax as finally determined, the Commissioner shall refund such excess to the executor. If the amount of the tax as finally determined exceeds the amount so paid, the collector shall notify the executor of the amount of such excess and demand payment thereof. If such excess part of the tax is not paid

within thirty days after such notification, interest shall be added thereto at the rate of 10 per centum per annum from the expiration of such thirty days' period until paid, and the amount of such excess shall be a lien upon the entire gross estate, except such part thereof as may have been sold to a bona fide purchaser for a fair consideration in money or money's worth.

The collector shall grant to the person paying the tax duplicate receipts, either of which shall be sufficient evidence of such payment, and shall entitle the executor to be credited and allowed the amount thereof by any court having jurisdiction to audit or settle his accounts.

Sec. 408. That if the tax herein imposed is not paid within 180 days after it is due, the collector shall, unless there is reasonable cause for further delay, proceed to collect the tax under the provisions of general law, or commence appropriate proceedings in any court of the United States, in the name of the United States, to subject the property of the decedent to be sold under the judgment or decree of the court. From the proceeds of such sale the amount of the tax, together with the costs and expenses of every description to be allowed by the court, shall be first paid, and the balance shall be deposited according to the order of the court, to be paid under its direction to the person entitled thereto.

If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have

been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution. If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies bear to the net estate. If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio.

Sec. 409. That unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. If the Commissioner is satisfied that the tax liability of an estate has been fully discharged or provided for, he may, under regulations prescribed by him with the approval of the Secretary, issue his certificate releasing any or all property of such estate from the lien herein imposed.

If (a) the decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a bone fide sale for a fair consideration in money or money's worth) or

(b) if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and if in either case the tax in respect thereto is not paid when due, then the transferee, trustee, or beneficiary shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, or to the extent of such beneficiary's interest under such contract of insurance, shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for a fair consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a bona fide purchaser for a fair consideration in money or money's worth.

Sec. 410. That whoever knowingly makes any false statement in any notice or return required to be filed under this title shall be liable to a penalty of not exceeding $5,000, or imprisonment not to exceed one year, or both.

Whoever fails to comply with any duty imposed upon him by section 404, or, having in his possession or control any record, file, or paper, containing or supposed to contain any information concerning the estate of the decedent, or, having in his possession or control any property comprised in the gross estate of the decedent, fails to exhibit the same upon request to the Commissioner or any collector or law officer of the United States, or his duly authorized deputy or agent, who desires to examine the same in the performance of his duties under this title, shall be liable to a penalty of not exceeding $500, to be recovered, with costs of suit, in a civil action in the name of the United States.

No. 736.

In the Supreme Court of the United States.

October Term, 1921.

Union Trust Company of San Francisco and Albert Lachman, as Executors of the Last Will and Testament of Henrietta S. Lachman, Deceased, plaintiffs in error,

v.

Justus S. Wardell, Collector of Internal Revenue for the the First District of California, and John L. Flynn, United States Collector of Internal Revenue for the First District of California.

IN ERROR TO DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF ON BEHALF OF DEFENDANTS IN ERROR.

[illegible] GOVERNMENT PRINTING OFFICE [illegible]

In the Supreme Court of the United States.

October Term, 1921.

Union Trust Company of San Francisco and Albert Lachman, as executors of the last will and testament of Henriette S. Lachman, deceased, plaintiffs in error,

v.

Justus S. Wardell, collector of internal revenue for the first district of California, and John L. Flynn, United States collector of internal revenue for the first district of California.

No. 236.

IN ERROR TO DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF ON BEHALF OF DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

This case was decided by the court below on demurrer in favor of the defendants. The material facts set forth in the complaint are: That on May 31, 1901, Henriette S. Lachman was the owner of 7,475 shares of the capital stock of the S. and H. Lachman Estate, a corporation; and on that day the said Hen-

riette S. Lachman executed and delivered to Albert Lachman and Henry Lachman, her sons, the following instrument, to wit:

To Albert Lachman and Henry Lachman, my sons:

This is to certify that I have delivered to you seven thousand four hundred and seventy-five (7,475) shares of the capital stock of the S. & H. Lachman Estate, represented by certificates numbers eleven (11), twelve (12) and thirteen (13) respectively, however, upon the following trust:

To pay to me during my lifetime, all the income earned and derived thereform, and, upon my death, to deliver two thousand four hundred and ninety (2,490) shares, represented by certificate number eleven (11) unto Henry Lachman, thenceforth for his absolute property; two thousand four hundred and ninety-five (2,495) shares, represented by certificate number thirteen (13) unto Albert Lachman, thenceforth for his absolute property; and yourselves, to-wit, Albert Lachman and Henry Lachman, to hold two thousand four hundred and ninety (2,490) shares, represented by certificate number twelve (12) upon my death, in trust, paying the income derived therefrom unto my daughter, Rebecca, wife of Leo Metzger, and upon the death of my said daughter, the income and earnings derived from said two thousand four hundred and ninety (2,490) shares shall be held, or expended, by you, according to your judgment, for the benefit of my grandchildren, the children of my said

> daughter; Rebecca Metzger, and upon the youngest of said children attaining the age of majority, all the then surviving children of my said daughter, Rebecca Metzger, shall be immediately entitled to said two thousand four hundred and ninety (2,490) shares in equal proportions;

that immediately upon the execution and delivery of said instrument Henriette S. Lachman assigned and delivered to the said trustees the said shares of stock of which they then became the owner; that on the 10th day of July, 1915, the said Henry Lachman died, leaving a will bequeathing his estate to Henriette S. Lachman by which the 2,490 shares of stock which belonged to said Henry Lachman were returned to said Henriette S. Lachman; that on July 13, 1914, Rebecca Metzger died, leaving three chlidren; that on the 14th day of November, 1916, the said Henriette S. Lachman died, leaving property which, including the 2,490 shares of stock returned to her under the will of Henry Lachman, was of the value of $302,963.64; that the defendants demanded and collected of plaintiffs the sum of $12,164.07 as an estate tax upon the said shares of stock of the S. and H. Lachman Estate, represented by the certificates which had been issued to Albert Lachman and Rebecca Metzger, and the officials of the Internal Revenue Bureau having refused to return said sum, this action was brought to recover same. (R. 2 to 9.)

The insistence of the defendants in error is that the said instrument of May 31, 1901, created a trust

to take effect in possession and enjoyment at and after the death of the said Henriette Lachman. This contention was sustained by the court below and a judgment entered accordingly. (R. 15, 16.)

It is believed that all the questions presented in this case and ably discussed by counsel representing plaintiffs in error have been considered in the brief and argument filed on behalf of defendant in error in the case of *Schwab* v. *Doyle*, No. 200 on this court's docket, and that argument will not be repeated here.

James M. Beck,
Solicitor General.
J. A. Fowler,
Of Counsel.

April, 1922.

O

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 236.

UNION TRUST COMPANY OF SAN FRANCISCO AND ALBERT LACHMAN, AS EXECUTORS OF HENRIETTA S. LACHMAN, DECEASED,

Plaintiffs-in-Error,

versus

JUSTUS S. WARDELL, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF CALIFORNIA, ET AL.,

Defendants-in-Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF OF AMICI CURIAE OPPOSING RETROACTIVE CONSTRUCTION OF THE REVENUE ACT OF SEPTEMBER 8, 1916.

J. WALLACE BRYAN,

CHARLES McH. HOWARD,

AMICI CURIAE.

The Daily Record Print, Baltimore, Md.

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TABLE OF CASES.

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BRIEF OF AMICI CURIAE OPPOSING RETROACTIVE CONSTRUCTION OF THE REVENUE ACT OF SEPTEMBER 8, 1916.

INTRODUCTION.

This brief is filed in support of the general proposition that the Revenue Act of September 8, 1916, imposing estate taxes should not be construed to levy on the estate of a decedent who died after the passage of the Act a

tax in respect of irrevocable transfers made, or trusts created, prior to its enactment.

The *amici curiae* have obtained leave to present this brief because the decision of this Honorable Court in the instant case will control, on the point of retroactive construction, the final decision in the case of CURLEY et al. vs. TAIT et al., 276 Fed. 840, now pending in the District Court for the District of Maryland. In that case, District Judge Rose has ruled that the Revenue Act of September 8, 1916, does not apply retroactively to such transfers made before it had been passed, and holds accordingly that no estate tax was chargeable against the estate of William H. Grafflin, late of Baltimore City, deceased, in respect of several gifts of securities made by Mr. Grafflin in his lifetime, and before the passage of the Act, to the Johns Hopkins Hospital and the Johns Hopkins University.

In reaching this conclusion, Judge Rose declined to follow the decision of the Circuit Court of Appeals for the Sixth Circuit in the case of SHWAB vs. DOYLE, 269 FED. 321, which case constitutes Number 200, October Term, 1921, on the docket of this Honorable Court, and has been assigned for argument at the same time with the instant case. The reasons for this decision are set forth in his opinion (printed in full as an appendix to this brief), which so forcibly presents the view that the Act of 1916 cannot be construed retroactively, and so clearly demonstrates the unsoundness of the lower Court's reasoning in SHWAB vs. DOYLE, that it merits the special attention of this Honorable Court. Furthermore, the facts in CURLEY vs. TAIT (supra) afford a striking example of the harsh and unjust consequences which would follow from giving the statute a retroactive construction as contended for by the Government; for not

only would the residuary estate of the donor be heavily penalized on account of irrevocable transfers made years before the statute was enacted, but the result would also be to levy a tax in respect of transfers made to a world-famous educational institution and hospital, in direct opposition to the present policy of Congress as declared in the Act of February 24, 1919.

The transfers in CURLEY vs. TAIT (supra) were several in number, and the Government claims that they are taxable as being "transfers intended to take effect in possession or enjoyment at or after his death" within the terms and application of the statute. The facts, as summarized in Judge Rose's opinion, are substantially as follows:

The first of these gifts was made February 1, 1910, and transferred 1,000 shares of the capital stock of the Consolidation Coal Company, valued at Mr. Grafflin's death at $109,500.00, to the Johns Hopkins Hospital in consideration of the latter's covenant to pay the net income received from the stock, after first paying taxes and deducting one per cent. of the income, unto Helen M. H. Kimball, who was then about to be married to William H. Grafflin, and who was in fact married to him shortly after the execution of the agreement, for and during her life, with a contingent right reserved to Mr. Grafflin to have the income for life should he survive her (which he did not), and thereafter the Johns Hopkins Hospital was to apply the securities and income to its own corporate purposes.

The other gifts were made September 22, 1913, November 30, 1915, and April 22, 1916. In each of them, the respective securities were transferred to the Johns Hopkins Hospital or the Johns Hopkins University, in con-

sideration of their respective covenants to pay the net income, after payment of taxes and certain other deductions, to William H. Grafflin during his lifetime, and after his death, to his wife, Helen M. H. Kimball Grafflin, if she survived him; and after the death of both of them, the Johns Hopkins Hospital and the Johns Hopkins University were authorized to apply the securities and income to their respective corporate purposes.

At the time of making these gifts, Mr. Grafflin was in sound health, and had no contemplation of death other than the general expectation thereof which all persons normally entertain. None of the transfers was or could have been made for the purpose of defeating federal estate taxes, since none had been laid or were contemplated. On the contrary, the transfer of February 1, 1910, was substantially an ante-nuptial settlement upon the donor's then intended wife and was made in consideration of the expected marriage; and the other gifts were also partly in the nature of settlements on his wife. It was expressly declared that it was not the intention of the donor to create a trust, and that the property was not to be charged with a trust, but that the entire title should pass immediately to the donees, subject to the obligation assumed by them under the contract of transfer to make the payments specified therein.

All of these gifts, which were absolute and irrevocable, were consummated by the immediate transfer on the books of the corporations concerned of the certificates for the respective shares to the Johns Hopkins Hospital and the Johns Hopkins University, and the latter thereafter appeared as sole and absolute shareholders of record, and exercised all of the rights of such shareholders, including the right to vote and to collect from the corporations concerned all dividends declared on

said shares. No dividends were in fact paid on the Roland Park Company stock embraced in the transfer of September 22, 1913, but such profits as the company earned before Mr. Grafflin's death were retained undistributed as an addition to surplus.

On these facts, which are undisputed, Judge Rose held that the transfers did not subject the estate of Mr. Grafflin (who died July 7, 1917) to an estate tax under the Act of 1916 in respect of these transfers made prior to the passage of the statute. The Government will appeal the case, but it is expected that no further action will be taken until the decision of this Honorable Court is announced in the case at bar.

ARGUMENT.

The Act of September 8, 1916, cannot be construed as levying a tax upon the estate of a decedent in respect of irrevocable transfers made and completed prior to its passage, even though the decedent dies subsequently.

It is well settled that statutes imposing special taxes must be construed strictly against the Government, and all doubt resolved in favor of the taxpayer. In the words of this Honorable Court:

> "In the interpretation of statutes levying taxes, it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt, they are to be construed most strongly against the Government, and in favor of the citizen."

Gould vs. Gould, 245 U. S. 151, 153.

Equally well established is the principle that all statutes are to be construed prospectively unless the language

used imperatively requires its retrospective application, especially when a retrospective construction would interfere with vested rights, or impose new obligations in respect of past transactions.

2 Sutherland on Statutes, page 1157.

In UNION PACIFIC RAILWAY COMPANY vs. LARAMIE STOCK YARDS, 231 U. S. 199, this Honorable Court said:

> "* * * A retrospective operation will not be given to a statute which interferes with antecedent rights or by which human action is regulated unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.' Especially is this so where such construction may render the statute unconstitutional."

See also 2 Sutherland on Statutes, pages 640, 1157 et seq.

Citing the above case, Judge Rose tersely remarks:

> "* * * The courts have gone to great lengths in construing away language which in its more natural import, seems to indicate that the Legislature intended the act should affect transactions which had been entered into before its passage * * * ."

The rule against retrospective construction applies with full and special force to statutes imposing inheritance or succession taxes. Such statutes are uniformly construed prospectively whenever possible, and do not affect prior vested rights unless the contrary intention is distinctly expressed or clearly implied. The liability of the estate to such taxes is normally determined by the law in force at the time the transfer was made.

Gilbertson vs. Ballard, 125 Iowa 420.
2 Ann. Cass. 607 and notes.

Matter of Seaman, 147 N. Y. 69.
Gleason & Otis on Inheritance Taxation, 56-59.

Additional authorities in support of this principle are cited on pages 38-49 of the brief filed in the instant case on behalf of the plaintiffs-in-error; and on pages 64-73 of the brief filed on behalf of the plaintiff-in-error in Shwab vs. Doyle.

Statutes attempting to lay inheritance taxes on estates and interests which have already vested have been held unconstitutional, except in cases wherein the State still had control of the property for the purpose of administration and distribution.

In re. Succession of Levy, 115 La. 377; 8 L. R. A. (N. S.) 1180, and note.
In re. Pell, 171 N. Y. 48; 57 L. R. A. 540.
In re. Pettit, 72 N. Y. Supp. 469; 2 Ann. Cas. 608, note.
Gleason & Otis on Inheritance Taxation, 39-40.

Additional authorities in support of this rule are cited on pages 49-61 of the brief filed in the instant case on behalf of the plaintiffs-in-error; pages 78-109 of the brief filed on behalf of the plaintiff-in-error in Shwab vs. Doyle.

It follows, accordingly, that the Act of September 8, 1916, cannot be construed as taxing transfers made prior to its passage unless its language is so clear in its application to such antecedent transfers as to admit of no other possible construction. In case of doubt, the construction must be prospective.

In considering whether the clear terms of the Act of 1916 imperatively require a retroactive construction, it

is to be borne in mind that the Revenue Act of September 8, 1898, and all previous acts imposed what, for convenience, may be called "death duties,"—taxes on the succession, which are levied upon and borne by the share of the particular beneficiary whose succession is taxed, and *not* upon the residuary estate of the donor. This statement is based on the exhaustive opinion of Mr. Justice White in KNOWLTON vs. MOORE, 178 U. S. at 56, construing the Act of 1898.

But the case is otherwise where the taxing Act attempts to operate on *past* successions. In CHANLER vs. KELSEY, 205 U. S. 480, Mr. Justice Holmes (dissenting as to the nature of the tax in question) expressed the general principle in this way:

> "But if there is no succession, or if the succession has fully vested, or has passed beyond the dependence upon the continuing of the State's permission or grant, an attempt to levy a tax under the power to regulate succession would be an attempt to appropriate property in a way which the 14th Amendment would not allow. * * * I also repeat that it has no bearing on the matter that, by a different law, the State might have derived an equal revenue from these donees in the form of a tax."

This principle also finds expression in KNOWLTON vs. MOORE, where the constitutionality of the Revenue Act of 1898 was involved:

> "Confusion of thought may arise unless it is always remembered that, fundamentally considered, it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties."

And in the same case, the question arose as to whether the rate of the tax was to be determined by the amounts received by the beneficiaries or the amount of the entire

estate. The learned Justice, speaking for the majority, adopted the former view and suggested that the latter might be unconstitutional, in the following language (p. 77):

> "It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems. On this question, however, in any of its aspects, we do not even intimate an opinion, as no occasion for doing so exists, as we understand the law, we are clearly of opinion that it does not sustain the construction which was placed on it by the court below."

The tax imposed by the Act of 1916 is, by the Act itself, called an Estate Tax and is imposed "upon the transfer of the net estate of every decedent dying thereafter." See definitions by the Court in UNITED STATES vs. WOODWARD, decided June 6, 1921, and UNITED STATES vs. FIELD, decided February 28, 1921. In the latter case it is said:

> "The Revenue Act of 1916, in Section 201, imposes a tax equal to specified percentages of the value of the net estate 'upon the transfer of the net estate of every decedent dying after the passage of this Act.' "

The *amici curiae* respectfully submit that, except to the extent necessary for the prevention of evasion (compare the language in the automobile-forfeiture case—GOLDSMITH vs. UNITED STATES, decided January 17, 1921), Congress cannot consistently with due process of

law, by its mere *fiat*, include in the estate of a decedent interests in property with which he had lawfully and irrevocably parted years before there was any taxing Act to evade. And much less can Congress, consistently with due process and equality, impose upon the residuary legatee of a decedent dying after the passage of the Act, the entire burden, that is to say, an amount based not only on the net estate, but also on all settlements made by the decedent in past years. And furthermore, it will be noted that under the terms of the Act, the tax on these past transfers must be measured by the value of the property at the time of the decedent's death. This, conceivably (e. g., Bethlehem Steel or Northern Pacific shares, or real estate in which oil or minerals are found or which soars in value through a "boom") might be many times the value at the time of the prior settlement; and the result could easily be appalling in its injustice.

The Courts are especially averse to retrospective constructions which would inflict obvious injustice upon persons unable to protect themselves. And a retrospective construction of the Act of September 8, 1916, would open up limitless possibilities of mischief, extending in many instances to the complete subversion of the entire testamentary disposition made by a decedent in respect to the property owned by him at death, and involving in utter ruin the natural objects of his bounty. In the case, for example, of a person who had made large gifts for philanthropic or other purposes, it is quite possible that his entire residuary estate might be taken in satisfaction of estate taxes levied in respect of irrevocable transfers made years before the statute had been thought of, thereby reducing to wretched poverty the decedent's wife and children, without affording any means of compelling the actual beneficiaries of such antecedent transfers to contribute one penny toward the tax.

Even aside from such possibilities, every case in which an antecedent transfer is taxed involves the injustice of forcing one person to pay for a benefit enjoyed wholly by another person, and without prior warning or opportunity of self-protection. If it be said that transfers intended to take effect in possession or enjoyment after the donor's death must be taxed in order to prevent evasions of estate taxes, the obvious answer is that there could be no evasion of the law by a transfer made years before its passage, and that such evasions in the future will be effectively prevented by a prospective construction of the statute.

In the present case, it is not necessary to determine the constitutionality *vel non* of a law which, in inflexible terms, acts retrospectively. The Act of September 8, 1916, uses, in this connection, simply the words "at any time"; and these words are easily and properly susceptible of prospective operation. They do not necessarily import the limitless past as well as future. So an offer to buy stock "at any time" after a specified date does not import perpetual time, but only a "reasonable" time in which to complete the purchase. (Park vs. Whitney, 148 Mass. 276; 1 Wds. & Phs., 1st Series, 603; Ib. 2nd Series, 244).

Obviously, the phrase "at any time" may properly be construed as simply emphasizing the application of the statute to all transfers that occur during its effective period. It does not necessarily or imperatively—or even naturally—extend the effective period into the limitless past, contrary to all the normal presumptions and equities.

As was stated by Judge Rose in CURLEY vs. TAIT:

" * * * These words, 'at any time,' however, are susceptible of a reasonable construction which could

limit them to transactions taking place thereafter.

> "Congress may well have thought it important to make clear that the length of time before the death at which a transfer took place was not to be a controlling circumstance. The words used were apt to express that intention, and may well have been employed with the limitation usually implied that they were not to effect transactions which had already taken place. The rule, of course, is that statutes are not to be given a retroactive construction when by doing so, 'antecedent rights are affected or human conduct given a consequence it did not intend.' Union Pacific Railroad Company vs. Snow, 231 U. S. 204-213."

Even against literal interpretation and apparent intention, Courts will deny to such a statute any retroactive operation when by so doing the character or quality of a past transaction is injuriously changed, and consequences are given to it contrary to the lawful intention of the parties at the time. In WINFRED vs. NORTHERN PACIFIC CO., 227 U. S. at 302, the Court denied a retroactive effect to the federal employers' liability Act, saying:

> "It takes away material defenses. That none may exist in the present case, is immaterial. It is the operation of the statute which determines its character."

In SOUTHWESTERN COAL COMPANY vs. McBRIDE, 185 U. S. 499, the Act read (italics supplied): "From and after the passage of this Act, it shall be unlawful for *any* person to receive *any* royalty,"—on coal mined in the Choctaw nation. It was held that moneys due for prior royalties were collectible.

In UNION PACIFIC RAILWAY COMPANY vs. LARAMIE STOCK YARDS, 231 U. S. 199, the Supreme

Court held that an Act of Congress providing that "*in all instances* in which title * * * is claimed" should be construed prospectively, to apply only to claims arising *after* the passage of the statute.

The general rule is clearly stated by this Honorable Court in TWENTY PER CENT CASES, 87 U. S. 179, as follows:

> "Even though the words of a statute are broad enough in their literal extent to comprehend existing cases, they must be construed as applicable only to cases that may hereafter arise, unless the language employed expressed a contrary intention in unequivocal terms."

In HOLT vs. HENDLEY, 232 U. S. 639, the Bankruptcy Act was amended so as to give the trustee the footing of any creditor in setting aside transfers by the bankrupt. The statute was held to be not retroactive:

> "Before that Act, Hold had a better title than the trustee would have got. We are of the opinion that the Act should not be construed to impair it. * * * We need not consider how far the constitutional power of Congress would have been limited."

In UNION PACIFIC RAILWAY COMPANY vs. SNOW, 231 U. S. 204, 213, one of the right-of-way squatter cases, the Court refused to give a retroactive effect to the Act of 1912 making State statutes of limitations applicable, in spite of its literal interpretation, saying:

> "And as we have pointed out, we are repelled from so doing by grave doubts as of its legality as well as of its justice."

Closely analogous is a case holding that an exemption of "*any* taxes" should be confined to taxes of the same general class as those described in the statute, and did

not carry an exemption from municipal taxes (2 Sutherland on Statutes, 723).

Indeed, if the words "has at any time" be construed literally, they would include *only* transfers made *prior* to the passage of the Act, and none made subsequently. This result would be manifestly absurd, and renders imperative the application of the rule of reason to determine what the statute really means. The door thus being open to construction, it is entirely proper to apply the ordinary rule against retrospective construction.

It is well settled that the use of the auxiliary verb "has" does not imperatively require that a statute containing it be construed retroactively to affect matters which had occurred prior to its passage. This principle is established in the following cases:

WILSON vs. RED WING, etc., 22 Minn. 488, involved an occupying claimant's Act providing for compensation for improvements made in ejectment "where any person * * * *has* peaceably taken possession of any land for which he has given a valuable consideration, or when any person *has* taken possession * * * under the official deed of any person or officer empowered by law," etc. This statute was held not retrospective so as to apply to improvements made before passage of the Act.

SOCIETY, ETC., vs. WHEELER, 22 Fed. Cas. 753, involved a similar statute of Vermont providing for compensation for improvements made "when any action shall be brought against any person for the recovery of any lands * * * which such person holds by virtue of a supposed legal title * * * and which the occupant * * * *has been* in the actual peaceable possession of for more than six years before the commencement of the ac-

tion. * * *" The Act was held not retrospective and hence inapplicable as to improvements made before the passage of the statute.

SHAY'S APPEAL, 51 Conn. 162, involved a statute providing: "Upon the death of any married woman intestate, leaving real estate in which her husband has no estate by the courtesy, but upon which he *has made* improvements during coverture with her consent * * * the value of such improvements shall constitute a valid claim against her estate," etc. It was held, that while the terms of the Act "are broad enough to include improvements prior to its passage," they are inapplicable to any such improvements made before its passage.

CRAFT vs. LOFINCK, 34 Kan. 365, involved a statute providing: "That where any portion of a township *has been*, or may hereafter be, detached and organized into another township, * * * since the vote upon which bonds were issued, such parts detached * * * shall be subject to taxation for the payment of principal and interest of such bonds * * *." The Court held the statute not to be retroactive so as to make liable a township for bridge bonds issued prior to the enactment.

GARFIELD vs. BEMIS, 84 Mass. 445, involved an Act providing "whenever any one has a claim against the estate of a deceased person, which has not been prosecuted within the time limited by law, he may apply to the Supreme Judicial Court, by bill in equity, setting forth the facts, etc." This Act was held not retroactive so as to permit the prosecution of a claim barred by the statute of limitations at its passage. The Court said:

> "For although it is so broad and comprehensive in its terms that it might embrace all cases, and apply to the past as well as to the future, yet there is noth-

ing in any of its provisions declaratory of the will of the legislature that it shall have a retroactive operation, or showing any necessity of so interpreting it. It will have complete effect if confined in its operation to cases arising subsequently to its enactment; its construction therefore must be in accordance with the general rule."

Conclusive evidence of the fact that the language of the Revenue Act of 1916 does not "imperatively demand" a retrospective construction is found in the amendment made in 1919, at the suggestion of the Bureau of Internal Revenue, by adding the words "whether such transfer or trust is made or created before or after the passage of this Act." Although the Government claims that this clause, which has frequently been used in other statutes to make clear the intention that an inheritance tax law shall operate retroactively, was inserted merely to clarify the statute, it is none the less an admission by the Department that such intention, if any existed, had been so ambiguously expressed as to require subsequent clarifying. This is simply another way of saying that the language of the Act of 1916 was doubtful in its application to transfers made before the passage of the Act, and this doubt must accordingly be resolved against the retrospective construction.

Directly in point is UNITED STATES vs. FIELD, 255 U. S. 257, holding that an intention that the Act of 1916 should apply to property passing under a general power of appointment could not be inferred from the amendment made in 1919 inserting a clause specifically including such property. This Honorable Court said:

> "Its insertion indicates that Congress at least was doubtful whether the previous Act included property passing by appointment. * * * The Government contends that the amendment was made for the

purpose of clarifying rather than extending the law as it stood, and cites a statement to that effect in the Report of the House Committee on Ways and Means. * * * It is evident, however, that this statement was based upon the interpretation of the Act of 1916, adopted by the Treasury Department; the same report proceeded to declare * * * that 'the absence of a provision including property transferred by power of appointment makes it possible, by resorting to the creation of such a power, to effect two transfers of an estate with the payment of only one tax'; and this, together with the fact that the committee proposed that the law be amended, shows that the Treasury construction was not treated as a safe reliance."

In opposition to these settled principles, the Government relies upon the decision of the Circuit Court of Appeals for the Sixth Circuit in SHWAB vs. DOYLE, 269 Fed. 321. It is respectfully submitted that the decision in this case was clearly erroneous. In the first place, it is founded upon a mistaken premise. The lower Court erroneously assumes that the tax in question is a succession tax and payable by the beneficiary, and therein relies upon the case of WRIGHT vs. BLAKESLEE, 101 U. S. 174, which was *not* dealing with an estate tax payable out of the donor's residuary estate, but with a succession tax payable by the beneficiary of the succession.

In the second place, the learned Court in SHWAB vs. DOYLE has been overruled as to the proper inference to be drawn from the subsequent amendments of the Act of 1916. By the amendment of 1918, Congress attempted to enlarge the words "at any time," by inserting the words "before or after the passage of this Act." It was urged upon the Court in SHWAB vs. DOYLE that a similar amendment indicated a doubt as to the original intention; but the Court said that the change merely amounted to a *clarification* of the statute. Now (1) it is

submitted that the learned Court entirely misconceived the issue. A statute that needs clarifying will never be given a retroactive operation where the result would contravene one's fundamental notions of fairness and justice. And (2) the Supreme Court has since held that a similar amendment of the Act of 1916 (U. S. vs. Field, 255 U. S. 257) *did* show that Congress was in doubt as to the interpretation of the original statute.

In conclusion, the following passage from the opinion in CURLEY vs. TAIT is cited as entirely destructive of the lower Court's reasoning in SHWAB vs. DOYLE, and showing the practical hardships involved in such clear light as to render unthinkable a retroactive construction of the Act of 1916:

> "In Shwab vs. Doyle, supra, the case of Wright vs. Blakeslee, 101 U. S. 174, was cited as authority for holding a similar statute retroactive. The act there construed imposed a tax upon the succession; that is, upon the right to receive, and was levied upon what passed to the heir, devisee, legatee, distributee or successor, and not upon the estate. Knowlton vs. Moore, 178 U. S. 41, 24, et seq. The distinction is neither pedantic nor technical, but as applied to the matter now in hand, is in the highest degree practical.
>
> In Shwab vs. Doyle, supra, it was held that the addition made by the Act of 1918 (40 Stat. 1097), of the words 'whether such transfer is made or occurred before or after the passage of the act,' was a legislative construction rather than an amendment of the statute now under consideration. The Supreme Court has since taken the opposite view, as to other broadening language then first introduced. U. S. vs. Field, 255 U. S.
>
> The case before the Circuit Court of Appeals was one of a transfer made in contemplation of death. It answered the objection to the practical hardships

which a retroactive construction might entail by saying, 'It is true that if the tax before us is retroactive, it might, at least theoretically, affect conveyances made many years before a grantor's death, but this consideration is hardly practical. Congress would, we think, scarcely be impressed with a practical likelihood that a transfer made many years before a grantor's death, say twenty-five years, to use plaintiff's suggestion, would be judiciously found to be made in contemplation of death under the legal definition applicable thereof, and without the aid of the two years prima facie provision.'

Apparently, the Court's attention was not drawn to some of the consequences which in a case like the one at bar, would follow from a retroactive construction. The present act, unlike its Federal predecessor, is an estate tax and not a tax upon the right to receive. If the Government's contention be sustained, the tax will come, not as in Wright vs. Blakeslee, supra, or in Cahen vs. Brewster, 203 U. S. 543, out of the sum received by the one to whom the taxed property passes, but will be collected from one to whom it does not. Neither the Johns Hopkins Hospital nor the Johns Hopkins University will pay one cent of it. It will all come out of property going to Grafflin's widow. Would Grafflin have made any of these transfers had he understood by so doing he would impose a charge upon his wife of upwards of $23,000? The care with which certain limitations were introduced into each of the agreements would seem to make it highly improbable. It is easy to conceive of a case in which a man of large estate might, before the passage of the Act of 1916, have made considerable transfers to relatives, friends or to charitable or educational institutions in somewhat the same fashion as Grafflin did, reserving for some residuary legatee a comfortable and even handsome balance of his estate. If the Government is right, such legatee might be stripped of every penny of the testator's bounty. The taxes on the transferred property might amount to more than the residue of the estate, large as the testator had every reason to

suppose it would be, and the Supreme Court, in language already quoted, has held that the courts will not assume that Congress intended any such consequences. Union Pacific R. R. Co. vs. Snow, supra."

CONCLUSION.

It is respectfully submitted that the Act of 1916 should not be construed as taxing a decedent's estate in respect of transfers made before the passage of the statute, and that the judgment of the lower Court construing it retroactively should be reversed.

Respectfully submitted,

J. WALLACE BRYAN,

CHARLES McH. HOWARD,

AMICI CURIAE.

Washington, April 10, 1922.

APPENDIX.

UNITED STATES DISTRICT COURT.

District of Maryland.

No. 1109—At Law.

Filed November 29, 1921.

JOHN J. CURLEY ET AL.

VS.

GALEN L. TAIT ET AL.

J. Wallace Bryan, Charles McHenry Howard and *Joseph C. France* for the plaintiffs.
Robert R. Carman for the defendants.

ROSE, D. J.—

The plaintiffs, as executors of the executrix of the late William H. Grafflin, who died July 7, 1917, are here seeking to recover $23,927.22 paid the defendant under protest as an estate tax upon $285,655, being the aggregate value, at the testator's death, of various securities transferred at different times, within seven and a half years before he died, to either the Johns Hopkins Hospital or the Johns Hopkins University. As neither institution was, in the view of the Government, to get any substantial benefit from the property until after the tes-

tator's death; the defendant says that the transfers were not intended to take effect in enjoyment until that time and that in consequence, the tax was properly collected.

The facts said to make the other securities taxable did not exist as to some Russian Roubles Internal 5s, worth, at the testator's death, $2,255. The inclusion by the Government of these in its tax charge appears to have been the result of some mistake or misunderstanding. They were given by Grafflin outright, and as neither they nor any of the other property invloved in this litigation was transferred in contemplation of death, the demurrer, so far as concerns the sum exacted upon them, must necessarily be overruled.

There are various minor differences in the terms of the transfers, but they were all alike in that by each of them, an out and out gift of the securities was made, and consummated by the issue and delivery of new certificates in the name of the grantee. It was expressly declared that the property conveyed was not charged with any trust. On the other hand, the hospital, or the university, as the case might be, covenanted in each of three agreements of transfer, that it would pay the net income during Grafflin's life to him, and after his death, and during such time as his wife should survive him, to her. After both of them were gone, the income, as well as the principal, was to be applied to the use of the grantee. The remaining one of the four, as it happened the earliest of them all in point of time, was in the nature of a marriage settlement. It recited that Grafflin was about to be married, and the hospital, with whom this particular agreement was made, covenanted to pay after the marriage was solemnized, the net income to the wife during her life, and afterwards to him during his life if he should prove to be the survivor.

APPENDIX (*Continued*).

By the terms of one of the agreements, the grantee, during the continuance of the life estate, was, after paying taxes, to retain 1 per cent. of the income for itself; by another 2½ per cent.; and by the others 5 per cent., but in that case it was itself to pay the taxes, whether they amounted to more or less than the 5 per cent. retained.

By most of them it was provided that anything in the nature of stock or bond dividends or payments on account of cumulative preferred dividends then in arrear, should be treated as additions to principal. To the man in the street, the enjoyment of a share of stock would be found in the right to apply to his own uses the dividends that might be declared upon it, and from this standpoint there is so much force in the Government's contention that neither hospital nor university enjoyed their gifts during Grafflin's lifetime, that without further discussion, it may, for the purpose of this case, be assumed to be sound, although it will be unnecessary so to decide. Even so, and upon the further assumption to be hereafter critically examined, that the statute is retroactive covers these transactions entered into years before it was enacted, the query remains, was the defendant justified in requiring the payment of the tax upon the full value of the stock transferred in contemplation of Grafflin's marriage, to the hospital, which covenanted to pay the net income thereof to the prospective wife during her life. Grafflin reserving nothing of substance to himself except the right to the net dividends during so much of his life as should extend beyond hers, thus making his interest dependent altogether upon the contingency that he should prove to be the survivor? The Government answers yes. It says that the hospital

was not to enjoy the stock until after his death. True, but is that all that is necessary?

If all beneficial ownership and possession irrevocably passes from the transferror at the time of the transfer, it would seem to be immaterial whether it goes to one person or to several, and if to several, whether their enjoyment is to be simultaneous or successive, and if the latter, at what time or upon the happening of what event the rights of one give place to those of another. In the instant case, had the agreement provided that after Mrs. Grafflin's death and during any period he survived her, the income should be paid to some one other than himself, there could, I imagine, have been no claim that any estate tax was chargeable. It follows that all that is taxable, if anything, is, in the language of the statute, "the interest" which he retained for himself. At the time the transfer was made, it was uncertain whether it would turn out to be worth much, little or nothing. As he died before his wife, it proved to be a fact valueless. If its taxable worth is to be ascertained as of the date of his death, as is the clear statutory rule when applicable, there is nothing to tax. Of course, at the time the agreement was made, the retained interest had an ascertainable value to those concerns which deal in insurance policies, annuities and like interests, the worth of any one of which is altogether uncertain, but the aggregate value of any large number of which can, from the mortality tables, be determined with approximate exactness.

The question of how much a contingent interest as Grafflin retained for himself under this agreement should be valued for estate tax purposes is not at all clear.

APPENDIX (*Continued*).

Apparently what the statute had in mind in declaring that the value of the gross estate of the decedent shall be determined by including the value at the time of his death, of all property, etc., is what it said, and no more. That is to say, the value of the property is to be then determined as of that date and not his interest in it, for if the latter were the case, any property which had been transferred by him in such manner that his interest ceased at death, would have no taxable value, and that is clearly that the statute does not mean.

At the hearing the Government was so confident that it was entitled to tax the full value of his interest and the plaintiffs so certain that none of it should be taxed, that neither of them discussed the question now mooted. As from what has been said it follows that the entire interest was not taxable, the demurrer to so much of the plaintiff's declaration as seeks to recover the tax exacted on all of it, must be overruled. The question of whether the Government was entitled to any part of the tax less than the whole need not be passed upon and should not be until the Court is enlightened by further argument.

All the above will be unimportant if the conclusion to which I have arrived upon another contention of the plaintiffs shall ultimately be sustained. They say that no tax at all was collectable, because the transfers here in controversy were all made before the statute was enacted. To this the Government has two answers. It says that the statute itself declares that it has reference to a transfer made "at any time." These words, however, are susceptible of a reasonable construction which could limit them to transactions taking place thereafter.

APPENDIX (*Continued*).

Congress may well have thought it important to make clear that the length of time before the death at which a transfer took place was not to be a controlling circumstance. The words used were apt to express that intention, and may well have been employed with the limitation usually implied that they were not to affect transactions which had already taken place. The rule, of course, is that statutes are not to be given a retroactive construction when by doing so, "antecedent rights are affected or human conduct given a consequence it did not intend." Union Pacific Railroad Company vs. Snow, 231 U. S. 204-213.

For reasons which will be hereinafter set forth, this statute, if retroactively applied, will, in some instances, cause serious hardship and injustice. The courts have gone to great lengths in construing away language which in its more natural import, seems to indicate that the Legislature intended the act should affect transactions which had been entered into before its passage. Union Pacific R. R. Co. vs. Laramie Stock Yards Co., 231 U. S. 190. If this were a case of first impression, I personally would have no hesitation whatever in holding that the Act of 1916 does not affect transfers made before it was passed.

But the Government says in the second place, that in Shwab vs. Doyle, 269 Fed. 321, the Circuit Court of Appeals for the Sixth Circuit held the act to be retroactive. Diversity of decision is especially unfortunate in the construction of tax statutes in which uniformity of interpretation and application are so important. Moreover, a court of equal rank would hesitate long before differing with a tribunal so eminent for wisdom and learning as that which has spoken on the subject. Nothing short of

APPENDIX (*Continued*).

the clearest conviction will justify a district judge in doing so, but there are rare occasions in which he must, because as the law does not make a decision of a Circuit Court of Appeals binding outside of its own circuit, the responsibility of determination is one from which he cannot escape.

In Shwab vs. Doyle, supra, the case of Wright vs. Blakeslee, 101 U. S. 174, was cited as authority for holding a similar statute retroactive. The act there construed imposed a tax upon the succession; that is, upon the right to receive, and was levied upon what passed to the heir, devisee, legatee, distributee or successor, and not upon the estate. Knowlton vs. Moore, 178 U. S. 41, 24 et seq. The distinction is neither pedantic nor technical, but as applied to the matter now in hand, is in the highest degree practical.

In Shwab vs. Doyle, supra, it was held that the addition made by the Act of 1918 (40 Stat. 1097), of the words "whether such transfer is made or occurred before or after the passage of the act," was a legislative construction rather than an amendment of the statute now under consideration. The Supreme Court has since taken the opposite view, as to other broadening language then first introduced. U. S. vs. Field, 255 U. S.

The case before the Circuit Court of Appeals was one of a transfer made in contemplation of death. It answered the objection to the practical hardships which a retroactive construction might entail by saying, "It is true that if the tax before us is retroactive, it might, at least theoretically, affect conveyances made many years before a grantor's death, but this consideration is hardly practi-

cal. Congress would, we think, scarcely be impressed with a practical likelihood that a transfer made many years before a grantor's death, say twenty-five years, to use plaintiff's suggestion, would be judicially found to be made in contemplation of death under the legal definition applicable thereof, and without the aid of the two years prima facie provision."

Apparently, the Court's attention was not drawn to some of the consequences which in a case like the one at bar, would follow from a retroactive construction. The present act, unlike its Federal predecessor, is an estate tax and not a tax upon the right to receive. If the Government's contention be sustained, the tax will come, not as in Wright vs. Blakeslee, supra, or in Cahen vs. Brewster, 203 U. S. 543, out of the sum received by the one to whom the taxed property passes, but will be collected from one to whom it does not. Neither the Johns Hopkins Hospital nor the Johns Hopkins University will pay one cent of it. It will all come out of property going to Grafflin's widow. Would Grafflin have made any of these transfers had he understood by so doing he would impose a charge upon his wife of upwards of $23,000? The care with which certain limitations were introduced into each of the agreements would seem to make it highly improbable. It is easy to conceive of a case in which a man of large estate might, before the passage of the Act of 1916, have made considerable transfers to relatives, friends or to charitable or educational institutions in somewhat the same fashion as Grafflin did, reserving for some residuary legatee, a comfortable and even handsome balance of his estate. If the Government is right, such legatee might be stripped of every penny of the testator's bounty. The taxes on the transferred property might amount to more

than the residue of the estate, large as the testator had every reason to suppose it would be, and the Supreme Court, in language already quoted, has held that the courts will not assume that Congress intended any such consequences. Union Pacific R. R. Co. vs. Snow, supra.

It follows that the demurrer to the declaration must be overruled generally.

Supreme Court of the United States.

OCTOBER TERM, 1921.

No. 236.

UNION TRUST COMPANY OF SAN FRANCISCO and ALBERT LACHMAN, as Executors of the last Will and Testament of Henriette S. Lachman, deceased, Plaintiffs in Error,

vs.

JUSTUS S. WARDELL, United States Collector of Internal Revenue for the First District of California, and JOHN L. FLYNN, United States Collector of Internal Revenue for the First District of California.

No. 303.

HARRIET L. LEVY, PAULINE JACOBS, and ADELINE SALINGER, Plaintiffs in Error,

vs.

JUSTUS S. WARDELL, United States Collector of Internal Revenue for the First District of California, and JOHN L. FLYNN, United States Collector of Internal Revenue for the First District of California.

In Error to the District Court of the United States for the Northern District of California.

Brief on behalf of Frederick W. De Foe, as Administrator of the Estate of Augusta L. Cummings, Deceased, and of Frederick W. De Foe, Cyrus C. Yawkey and Leland G. Gardner, as Trustees under a Trust Deed Executed by said Decedent on February 1st, 1912, as *Amici Curiae*.

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BRIEF ON BEHALF OF FREDERICK W. DeFOE, AS ADMINISTRATOR OF THE ESTATE OF AUGUSTA L. CUMMINGS, DECEASED, AND OF FREDERICK W. DeFOE, CYRUS C. YAWKEY AND LELAND G. GARDNER, AS TRUSTEES UNDER A TRUST DEED EXECUTED BY SAID DECEDENT ON FEBRUARY 1ST, 1912, AS AMICI CURIAE.

The interest of the parties, above named as *amici curiae*, in the above-entitled causes rests upon the following state of facts:

Augusta L. Cummings died on September 5, 1918, possessed of an estate of approximately Five Hundred Thousand Dollars ($500,000). On February 1st, 1912, she had made a trust deed by which she transferred to the trustees therein named the major part of her property for the uses and purposes described in the deed. Under those trusts a large part of the income was to be paid annually to the settlor. The trust term was to continue during the life of the settlor, and in the event (which has happened) of her death before her son should reach the age of twenty-five years, was to continue until he should have reached that age or until his earlier decease; the son is still alive and has not yet reached the age of twenty-five years and the trust, therefore, still continues. The deed contained no power of revocation, nor was the property conveyed thereby any part of the estate of the settlor at her death. The settlor did reserve in the deed the right at any time after February 21st, 1928 (that being the date on which her son would become twenty-five) to direct as to one-half of the trust estate a disposition differing from that expressed in the trust deed, in view of any changed conditions that might then exist. It will, of course, be apparent that, the settlor, having died in 1918, never enjoyed the power so reserved, and never had, from the date of the execution of the trust deed until the date of her death, any power or control of any kind over the trust estate.

The Commissioner of Internal Revenue ruled that the trust deed made by the deceased on February 1st, 1912, was intended to take effect in pos-

session or enjoyment at or after her death, and that the property transferred should be included in the net estate upon which the Federal estate tax was computed. The value of the trust estate, calculated as of the date of her death, was such that the estate tax payable upon the Commissioner's theory amounted to $1,263,644.53, or more than twice the value of the entire estate which the decedent owned at her death and which came into the possession of her administrator. The tax was paid under compulsion and under protest. Such payment wholly wiped out the estate in the hands of the administrator, and the payment of the balance of the tax, amounting to over Eight Hundred Thousand Dollars ($800,000) was made from property of the trust estate in the hands of the trustees.

The above facts are stated thus briefly as evidence of the standing of those on behalf of whom this brief is filed to appear as *amici curiae*. Those facts do, however, throw strong light upon the oppressive consequences which inevitably flow from the departmental construction of the Estate Tax Law as necessitating the inclusion, as if part of the decedent's estate, for the purposes of taxation, of property with which the decedent had validly and irrevocably parted long prior to the passage of the Act. Many striking examples showing clearly that such construction results often in practical confiscation of property are given in the briefs on behalf of the plaintiffs in error themselves, and there is no necessity for repeating them.

Mrs. Cummings parted in 1912 with the property embraced in the trust deed. She never had any power to regain possession of that property,

yet the fact that she had made that disposition subjected her, on the Government's theory, to a tax which completely wiped out her remaining estate, and thus destroyed any opportunity she might otherwise have had to dispose of her remaining property by will. In the face of this practical demonstration, the statement contained in the brief of the plaintiff in error in No. 236,—that a donor who had made irrevocable gifts of property long before anyone had any reason to contemplate the enactment of the 1916 law might find it impossible to make suitable, or even any, provision for his wife and children,—cannot be dismissed as fanciful.

The questions involved in the present cases are two:

(1) Was it the intention of Congress to impose a tax upon transfers made or trusts created prior to the enactment of the Estate Tax Law of 1916, by requiring the inclusion of the property so transferred in the net estate upon which the tax is calculated, although neither at the time of the passage of the Act nor at the time of his death was the property in any manner subject to the disposition or control of the decedent;

(2) If the Act necessitates such a construction, is it constitutional?

I.

The Constitutional Basis of the Federal Estate Tax.

Under the power to impose "death duties", Congress may tax without apportionment the "power to transmit or the transmission or receipt of property by death." The tax may be either upon the transmission of property by the decedent at his death or upon the receipt thereof by the beneficiary. The Act of 1916, unlike its predecessors, imposes the tax upon the transmission. The tax being an excise on the privilege of transmitting property can only be imposed where such privilege is exercised subsequent to the passage of the law.

From early times this court has held that taxes which may properly be classified as "death duties", although usually measured by the value of property and incapable of being shifted, do not constitute direct taxes. The reason was historical.

This court has held that Congress had authority to impose without apportionment a tax upon the recipient of a succession to real estate based upon the value of the privilege of receiving it (*Scholey* v. *Rew*, 23 Wall. 331); a tax upon the recipient of a legacy based upon the value of such legacy (*Knowlton* v. *Moore*, 178 U. S. 41); and the tax of 1916 upon the transmission of property by will, based upon the value of the property so transmitted (*New York Trust Co.* v. *Eisner*, 256 U. S. 345). In the case last cited this Court said:

> "* * * this kind of tax always has been regarded as the antithesis of a direct tax;

'has ever been treated as a duty or excise, because of the particular occasion which gives rise to its levy.' 178 U. S. 81, 83. Upon this point a page of history is worth a volume of logic."

What, then, is "this kind of tax," to which this Court in its most recent decision has referred? The essential characteristics of a death duty have been fully stated in *Knowlton* v. *Moore, supra.* Death duties are, in the language of Mr. Justice White, laid upon

> "the principle that death is the generating source from which the particular taxing power takes its being and that it is the power to transmit, or the *transmission from the dead to the living,* on which such taxes are more immediately rested" (italics ours). (178 U. S. p. 56).

Again he says (p. 47) that

> "the public contribution which death duties exact is predicated on the *passing of property as the result of death,* as distinct from a tax on property disassociated from its *transmission or receipt by will, or as the result of intestacy*" (italics ours).

This phraseology runs through the entire opinion. Thus (p. 57):

> "It is the power to transmit or the *transmission or receipt of property by death* which is the subject levied upon by all death duties" (italics ours).

In later cases in which this Court has had occasion to discuss the distinction between direct and indirect taxation, the decision in *Knowlton* v. *Moore, supra,* has been rested expressly upon

this ground. See for instance *Thomas* v. *United States*, 192 U. S., 363, 370, mentioning the taxes sustained in *Knowlton* v. *Moore*, 178 U. S. 41, as being "on the *transmission of property from the dead to the living*" (italics ours). The same phrase is used in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, in a footnote, page 159, summarizing the taxes which this Court had held to be true excise taxes.

The death duties which this Court had sustained prior to the case of *New York Trust Co.* v. *Eisner*, *supra*, had been taxes upon the privilege of *receiving* property. In the case last cited this Court held that the constitutional power applied as well to taxes upon the estate of the donor, based upon the privilege of *transmitting* the property.

The fact that the constitutional basis of the two taxes is the same, however, does not mean that the nature of the tax is the same. There are important differences between the tax upon the receipt and the tax upon the transmission of property which render certain decisions of this Court construing prior Congressional death duties inapplicable to the taxing act now under discussion.

The present Federal estate tax is not a legacy or succession or inheritance tax. This is recognized in the first place by the Treasury Department itself. See Article I of Regulations 37, Revised, of the Bureau of Internal Revenue as follows:

> "The subject of tax is the transfer of the entire net estate, not any particular legacy, devise, or distributive share. It is not an individual inheritance tax".

The same conclusion has been reached in the State Courts which have had occasion to construe

the act (see *Matter of Sherman*, 179 App. Div., 497, 500, affirmed 222 N. Y. 540; *Matter of Hamlin*, 226 N. Y. 407; *Corbin* v. *Townshend*, 92 Conn. 501, 505; *In re Knight's Estate*, 261 Pa. 537; *People* v. *Pasfield*, 284 Ill. 450; *Estate of Roebling*, 89 N. J. Eq. 163; *State* v. *Probate Court*, 139 Minn., 210; *Plunkett* v. *Old Colony Trust Co.*, 233 Mass. 471.

The former death duties imposed by Congress, commencing with the legacy tax imposed in the year 1797, were described in the opinion of this Court in *Knowlton* v. *Moore*, 178 U. S. pp. 50-53. They were all legacy, inheritance or succession taxes, under which system of taxation "the passing of each particular gift or distributive share of both the personal and real estate" was "treated as separate, one from the other, and each as forming a distinct estate subject to taxation". *Knowlton* v. *Moore*, 178 U. S. p. 68. The salient feature of these acts was that it was the *receipt* of the property which was the privilege taxed.

The constitutionality of the Succession Tax Law of 1864 (13 Stat. 287), as applied to a devise by a decedent who died in 1869, was sustained in *Scholey* v. *Rew*, 23 Wall., 331, upon the ground that (pp. 348-349):

> "The subject matter of the assessment is the *devolution* of the estate or the *right* to become beneficially entitled to the same, or the income thereof, in possession or expectancy, under the circumstances and conditions specified in the other parts of the section." (Italics ours).

Section 127 of the Act of 1864 (13 Stat. 287, 288) provided as follows:

"Sec. 127. And be it further enacted, That every past or future disposition of real estate by will, deed, or laws of descent, by reason whereof any person shall become beneficially entitled, in possession or expectancy, to any real estate, or the income thereof, upon the death of any person dying after the passing of this act, shall be deemed to confer, on the person entitled by reason of any such disposition, a 'succession'; and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote the grantor, testator, ancestor, or other person from whom the interest of the successor has been or shall be derived".

As a matter of construction the Court held in *Wright* v. *Blakeslee*, 101 U. S. 174, that the tax was assessable when a contingent remainder created prior to the passage of the act was transformed into an "estate in fee in possession absolute" by reason of a death occurring after such passage.

No constitutional question was raised or considered in *Wright* v. *Blakeslee*. The reason for this is plain. The case was long prior to *Pollock* v. *Farmers' Loan and Trust Co.*, 157 U. S. 429, 158 U. S. 601, in which the now accepted rule that a tax may be a direct tax, though not stated to be laid upon real property as such, if it was in fact laid upon one of the essential incidents of ownership thereof, was for the first time enunciated. It must also be noted that the tax in *Wright* v. *Blakeslee* was not laid merely upon the coming into possession of an estate, but the Court emphasized the fact that prior to the death of the life tenant, no estate had vested. Moreover, the tax considered in *Wright* v. *Blakeslee*, *supra*, was upon the receipt of property and levied against the recipient.

That case, therefore, furnishes no support to an argument that the application of the Estate Tax Law of 1916 to transfers fully consummated *inter vivos* before the passage of that Act would be constitutional, first, because no constitutional question was involved in *Wright* v. *Blakeslee*, second, because there was a change in the title to the corpus of the property after the passage of the Act, third, because the tax was levied against the recipient whose bare contingent remainder was transformed after the Act into an estate in fee simple absolute; if the Estate Tax Law of 1916 were to be applied to the situation presented in *Wright* v. *Blakeslee*, it would mean that the tax would be levied against the life tenant which is, we submit, a wholly different proposition.

The Act of 1916 not only does not impose a succession tax in general with respect to the property of the decedent transmitted at his death, but so far as it applies to transfers executed or trusts created during the decedent's lifetime it is equally clear that it is not a succession tax. The entire tax is payable by the executor or administrator of the decedent out of the estate left by the decedent before its distribution. The provision of Section 200 that the term "executor" shall embrace "any person who takes possession of any property of the decedent" applies only where "there is no executor or administrator." Further this provision refers to one taking possession "of any property of the decedent." One holding as transferee or trustee under a valid transfer executed in the lifetime of the decedent is not in possession of the property of the decedent, as the property has already passed from the decedent, and this is none the less true because a remainder-

man may come into possession at or after the decedent's death.

The obligation under Section 205 of every person "holding a legal or beneficial interest" in what is termed the "gross estate" to make a return "as to such part of the gross estate" where the executor fails to make a complete return, does not alter the liability for the payment of the tax.

The statute provides that "the executor shall pay the tax to the collector or deputy collector" (Section 207). If there is an executor or administrator, and if there is an estate in his hands as such, it is plainly his duty to pay the entire estate tax before that estate is distributed. In case the tax is thus paid by the executor or administrator out of the decedent's estate in his hands, no part of the tax is repayable to the executor or administrator by the transferee or trustee or beneficiary of any property transferred during the decedent's lifetime notwithstanding that there is a coming into possession of an interest on the decedent's death, and notwithstanding that this interest is to be included in fixing the value of the "gross estate" for the purpose of arriving at the "net estate" and thus at the amount of the tax. As the facts of this case show, the tax may exhaust the entire estate in the hands of the executor or administrator.

It is only when the tax is not paid when due that the transferee or trustee is made liable for the tax under Section 209 of the Act of 1916. This provision, however, does not alter the nature of the tax. When the transferee or trustee is compelled to pay the tax, it is not payable as a succession tax, but because of the absence of an estate of the decedent which would otherwise bear the tax, and

because the property transferred is in that case constructively considered to be a part of the estate of the decedent and taxable as such. That the tax is not a succession tax is made even clearer by the provision of Section 208 that if any part of the tax is paid by such transferee or trustee, that is, by "any person other than the executor in his capacity as such", such person is entitled to reimbursement "out of any part of the estate still undistributed"; and that section expressly states that it is "the purpose and intent" of the Act that the tax "so far as is practicable, and unless otherwise directed by the will of the decedent", shall be paid "out of the estate before its distribution."

Nothing could more clearly show that the present act does not impose a tax on the coming into possession than the facts of the present case. The trust term specified in Mrs. Cummings' deed has not yet expired and will not expire until February 21, 1928, or the earlier death of her son. If this tax were a tax on coming into possession its payment would necessarily be postponed until that date. Such is certainly not the governmental construction.

Even if we were to concede,—which we do not,—that Congress has the constitutional power to levy a tax upon the coming into possession or enjoyment, upon the occasion of a death occurring after the passage of the Act, although title to the property had passed prior to its passage, that power would not sustain the attempt of the Treasury Department to include in the taxable estate under the Act of 1916, property which had been transferred prior to the Act. The existence of Congressional power, and the exercise of Congressional power are two very different things. Thus

it was suggested in *Eisner* v. *Macomber*, 252 U. S. 189, that Congress had constitutional power to levy an excise tax upon the privilege of receiving a stock dividend, but the existence of that power could not be availed of to justify the taxation of the stock dividend as income under an Act which could not fairly be construed as anything but an income tax law. So in the present case the tax is a tax upon the donor's estate by reason of the transmission of the net estate, and it cannot be sustained by any suggestion of a constitutional power of Congress to impose an entirely different sort of tax based upon the coming into possession or enjoyment by the donee, if indeed such power exists. "The distinction," said Judge Rose in *Curley* v. *Tait*, 276 Fed. 840, 843, distinguishing *Wright* v. *Blakeslee*, *supra*, "is neither pedantic nor technical, but, as applied to the matter now in hand, is in the highest degree practical."

The tax imposed by the Act of 1916 is called by the Treasury Regulations a "Transfer Tax", and the Act itself (Section 201) states that the tax is imposed on "the transfer of the net estate of every decedent dying after the passage of this Act." Plainly, however, as the concept of a transfer necessarily involves the passing of an interest, the tax cannot be regarded as a "transfer tax" unless it is imposed either upon the receipt or upon the transmission of property. If it were imposed upon the receipt of property it would be a legacy, inheritance or succession tax; we have seen that it is not such. If it is a transfer tax, therefore, it must be upon the transmission of property and so it has been construed. It also seems plain that Congress consciously intended to lay the tax upon the transmission rather than

upon the receipt of the property. This is in accordance with the Report of the Committee on Ways and Means indicating the plan of the framers of the Act of 1916 to establish an Estate Tax as distinguished from legacy, inheritance or succession taxes such as had been imposed by the previous acts of Congress and such as are now in force in many states. The Report of the Committee said (Report No. 922, 64th Congress, First Session):

> "Thirty States have laws imposing inheritance or share taxes both upon direct and collateral heirs, twelve other states have laws imposing inheritance taxes upon collateral heirs. Your Committee deemed it advisable to recommend a Federal Estate Tax upon the transfer of the net estate rather than upon the shares passing to heirs and distributees or devisees and legatees. The Federal Estate Tax recommended forms a well-balanced system of inheritance taxation as between the Federal Government and the various states, and the same can be readily administered with less conflict than a tax based upon the shares."

It is thus apparent that while the state laws form the basis for the language used in the present act, the imposition of the tax and its burden were deliberately placed upon the estate of decedent and not upon the recipient of any benefits which might accrue on the occasion of death. Congress hoped to derive important advantages thereby. Thus in levying a tax upon the transmission of property Congress could regard the property of the decedent collectively and apply the graduated rates to the entire estate thus transmitted, though a tax upon the receipt of property

would have to be regarded distributively with respect to each interest received (*Knowlton* v. *Moore*, *supra*). The tax actually laid is more analogous to a probate duty of the sort described by Mr. Justice White in *Knowlton* v. *Moore*, 178 U. S. p. 68, though it differs from a probate duty in that it may exhaust the entire estate. The necessity of distinguishing between the two kinds of death duty, that is, the duty laid upon the receipt of the estate and the duty laid upon the transmission of the estate, is well expressed in *Hanson on Death Duties*, p. 63, quoted in *Knowlton* v. *Moore*, 178 U. S. at p. 49, as follows:

> "The new duty imposed by the Finance Act, and called estate duty, as has been said above, supersedes probate duty; but the key to the construction of the Finance Act lies in remembering that the new estate duty, although it is leviable on property which was left untouched by probate duty, such as real estate, yet is in substance of the same nature as the old probate duty. What it taxes is not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death. Unless this principle is kept clearly in view, the mind is constantly tempted by the wording of the act to revert to principles of succession duty which have no real connection with the subject."

The estate which is transmitted at death, and so is unquestionably the proper subject of a death duty based upon the occasion of such transmission is thus the estate of which a decedent died seized after the passage of the Act.

It is evident that distinct questions are presented where the property concerned is not a part of the decedent's estate at his death, but has been

transferred by valid instruments which took effect in his lifetime.

Some transfers, though in form made during the decedent's lifetime, are really testamentary in character, that is, ambulatory, taking no real effect until his death. The most conspicuous example is a gift *causa mortis*, which has usually been regarded as not effective until the death of the donor. See *Matter of Seaman*, 147 N. Y. 69. Another class of such ambulatory instruments is that in which the donor reserves to himself complete and continuous power to retake the property. In such case the property may be said not to have passed beyond the control of the donor during his life. He may regain possession or make a different disposition thereof at any time. As this Court said in *Bullen* v. *Wisconsin*, 240 U. S. 625, 630, concerning a deed in which the grantor had retained a complete power of disposition:

> "The words of Lord St. Leonards apply with full force to the present attempt to escape the Wisconsin inheritance tax, 'To make a distinction between a general power and a limitation in fee, is to grasp at a shadow while the substance escapes.' "

Therefore a tax upon such ambulatory instruments at the death of the donor might reasonably be classified as a death duty upon the ground that substantially speaking the property was a part of the donor's estate at his death.

In addition to these ambulatory instruments, however, there are other forms of transfer which, though not ambulatory, or in any sense testamentary in character, have been commonly included in inheritance tax statutes. The first class is that of gifts made, not *causa mortis* in the sense of not

taking effect until death, but made "in contemplation of death". Such instruments take effect *inter vivos*, but the fear of death, and often the desire to avoid an existing inheritance tax, furnish the motive therefor. Another class of transfers *inter vivos* is that with which these cases are concerned, namely, deeds of trust made without power of revocation but reserving to the grantor the income of the property during his life.

The power of the States to tax transfers by such deeds of trust has been placed upon the ground that "there is no natural right to create artificial and technical estates with limitations over" (*Keeney* v. *New York*, 222 U. S. 525, 533) and that such a conveyance would be "often resorted to as a means of evading the inheritance tax" (*Id.*, p. 536). While there was a power of revocation in the trust deed considered in the *Keeney* case, no point seems to have been made of this fact by either side. The Court carefully distinguished the feature of the New York Act which was before it in the *Keeney* case from so much of the statute "as imposes an inheritance tax," i. e. a death duty (222 U. S., p. 533), and its decision that the tax was imposed upon the transfer *inter vivos* and not upon the occasion of death was necessary because between the date of the transfer and the date of the death the donor had ceased to reside in New York. The Court held that, as he was a resident of New York at the time of the transfer, it was taxable.

That the tax was not a death duty was recognized by the New York Court of Appeals in the same case, *Matter of Keeney*, 194 N. Y. 281, where the court in holding the transfer taxable as coming within the phrase "intended to take effect in

possession or enjoyment at or after death" said (p. 285):

> "It is not an inheritance or succession tax, but it is not necessary that it should be such to support the statute imposing it."

This view of the nature of the tax imposed on such a transfer was not dissented from by this court.

We submit that the power of Congress to tax irrevocable transfers, in which the grantor merely reserves income during his life, must rest either upon the ground that such a power is necessary to prevent evasion of the death duty and so is necessarily incident to the power to impose the death duty, or it must rest upon some ground having nothing to do with death duties, but analogous to the right of Congress to tax certain peculiar forms of transfer, of which the stamp duty on sales of shares of stock in corporations which was sustained as an excise in *Thomas* v. *United States*, 192 U. S. 363, furnishes an example.

Whichever is the true ground of the power of Congress to include such transfers *inter vivos* in the statute imposing the death duty, neither furnishes the slightest justification for an imposition of the tax upon transfers irrevocably effectuated prior to the passage of the act. If the true ground is that the power to impose the death duty presupposes the power to prevent evasion thereof, it is sufficient to say that there can be no evasion of a tax which has not yet been imposed. If the ground is the power to tax as a privilege the making of a transfer of this peculiar nature, we may point to the unbroken line of authority (cited

at pages 38 to 49 of the brief for plaintiff-in-error in No. 236) that such a tax imposed as upon a privilege cannot be laid when the privilege has been fully exercised before the passage of the taxing act. This feature will be more fully developed in another point.

Concluding, therefore, the discussion of the nature of the tax imposed by the Act of 1916 and the constitutional basis thereof, we submit that it is clear:

(1) That insofar as the tax is laid upon the estate of the decedent, which passes by will or under the intestate laws, it is a true death duty imposed upon the *transmission* of the decedent's estate;

(2) Insofar as the tax is imposed upon gifts *causa mortis* or other ambulatory instruments of a testamentary character, it may be also properly classified as a death duty;

(3) Insofar as it attempts to include property conveyed by irrevocable transfers *inter vivos* made subsequent to the passage of the Act, it may perhaps be sustained on the ground that such provisions are necessary to prevent evasion of the death duty, or upon the power of Congress to tax certain forms of transfer *inter vivos;*

(4) But the inclusion of property which had been conveyed by an irrevocable transfer *inter vivos* completely effectuated prior to the passage of the taxing act may not be referred to any hitherto recognized power of Congress.

II.

If the Estate Tax Law of 1916 be construed so as to levy a tax upon the executor upon the value of property which was not transmitted upon the death of decedent, but which had been validly transferred by him prior to the passage of the law and over which he had at the time of his death no power of disposition, the Act would be beyond the constitutional power of Congress.

Property which has passed under a valid transfer in the decedent's lifetime and over which he has no control at the time of his death cannot on any admissible theory be regarded as transmitted by reason of his death. The present Act being as above shown a tax upon the transmission of property by the decedent finds its only normal application to the case of property which is actually, or may properly be deemed to be constructively, a part of his estate at death.

We have shown above that the Act, insofar as it deals with irrevocable transfers *inter vivos*, does not in fact impose a death duty at all. In grouping under one taxing act, however, some taxes which are true death duties, and other taxes which are not death duties but are taxes upon transfers which might otherwise be availed of to avoid the imposition of the death duties, it follows precedents established by the inheritance tax laws of the several states. (*Keeney* v. *New York*, *supra*). It is true that the Federal Estate Tax is a more glaring example of confusion of death duties with taxes which are not death duties than the laws of the several states, because those laws impose inheritance taxes, namely, taxes upon

the receipt rather than upon the transmission of property, and it is the distinguishing feature of such laws that the estate is regarded distributively and each transfer is separately considered for the purpose of the graduated rates. The Federal Estate Tax goes one step further and introduces the feature of a "constructive estate", that is, it treats the transfers at death and the transfers which have taken place *inter vivos* prior to death as constituting one entire estate upon the aggregate value of which the graduated rates are imposed.

So far as the tax attempts to reach property which was not only no part of the estate of the deceased at his death, but had been validly and irrevocably transferred before the passage of the Act, it is, we submit, invalid as violative of the Fifth Amendment of the Federal Constitution.

We fully recognize that it has been said that the power of taxation granted to Congress by the Constitution is not subject to any limitation to be found in the Fifth Amendment. The cases where such expressions were used, however, were cases where the particular exaction was plainly within the taxing power. Here the contention is that the Government is not proceeding in accordance with its taxing power. It is attempting to tax a privilege that has been fully exercised and we contend that this furnishes no better basis for the imposition of an excise than as if the privilege had never existed. Where the question before the Court is whether Congress is proceeding under its constitutional authority to levy excises, or is taking property without such authority, it cannot be dismissed by a mere statement that the Fifth Amendment is not a limitation on the taxing power.

We submit that it cannot be denied that if Congress had directly attempted to tax transfers of the sorts described made prior to the passage of the Act, the conclusion that it would constitute a deprivation of property without due process of law could not be avoided. As was said in *People* v. *Trust Company of America*, 205 N. Y. 74, 77, by Chief Judge Cullen, speaking for the New York Court of Appeals with respect to a mortgage excise tax:

> "The Legislature could not impose such a tax upon the defendant for a transaction which, at the time it was effected, was subject to no tax."

Even the states,—whose power of transfer taxation is, to say the least, as broad as that of the Federal Government,—have with practical unanimity disavowed any power to tax transfers which have become fully effective prior to the passage of the Taxing Act. These cases are fully covered in the brief on behalf of the plaintiff in error in No. 236, pages 36 to 49, and there is no necessity here to repeat the argument or the citations.

The validity of a Federal excise tax, retroactive to a limited extent, has been recognized by this Court. Thus the Corporation Tax Act of 1909, (36 Stat. c. 6, 112-113), which became a law on August 5th of that year, was applicable to the period beginning January 1st, 1909, and was sustained (*Flint* v. *Stone Tracy Company*, 220 U. S., 107). The Income Tax Act of October 3, 1913, (38 Stat. 166) was held to be valid with respect to the period from March 1st, 1913, as the retroactivity did not go beyond the adoption of the Sixteenth Amendment. *Brushaber* v. *Union Pacific Railroad*, 240 U. S. 1, 20. (See also *Stockdale* v. *In-*

surance Companies, 20 Wall, 323, 331). And in *Billings* v. *United States*, 232 U. S. 261, 282, the tax with respect to the use of foreign built yachts enacted in August, 1909, (36 Stat. 112) was held to be valid as applied to the taxes payable on September 1st, 1909, though retroactive with respect to the first annual period. In these cases, however, there was simply a selection by Congress of a normal fiscal or taxable period to which the tax applied, and the Act had relation merely to the commencement of the current term or period in the course of which the Act was adopted. These cases furnish no support for the taxation of a privilege which had been fully and completely exercised prior to the passage of the taxing act, and wherein is involved no element of continuity of use extending beyond the date of such passage. An attempt to tax an owner or his estate with respect to a transfer fully consummated before the passage of the Act, but based upon the value of the property at a time subsequent to its transfer would, we submit, clearly transcend the limit of the discretion of Congress in the imposition of excise taxes and would constitute in no true sense an excise but merely an arbitrary and unwarrantable exaction.

If, as we submit to be plain, the tax upon the past transfer cannot be justified as a transfer tax or an excise tax, it can only be regarded as a direct tax upon property by reason of its ownership. Indeed, in the leading case of *Matter of Pell*, 60 App. Div. 286, 171 N. Y. 48, the New York Appellate Division attempted to sustain a Transfer Tax upon a transfer fully consummated prior to the passage of the Act, which it stated could therefore not be imposed as a transfer tax, upon

the theory that it was a direct tax upon property. The Court of Appeals reversed the decision upon the ground that the Legislature had had no intention of imposing a direct tax, but had intended to impose a transfer tax which, it was held, could not validly be done. But the possibility upon which the Appellate Division seized in an attempt to sustain a Transfer Tax upon a past transfer is not available to the Government in this case, because if such a tax were a direct tax upon property it would be void as not apportioned in accordance with the constitutional requirements.

This Court in *Brushaber* v. *Union Pacific Railroad,* 240 U. S. 1, 15, gives expression to the now accepted view that a direct tax on property is one laid because of ownership. This, however, cannot be taken to mean that a direct tax must be laid on property because of ownership by any particular persons or persons, nor can it be taken to mean that a direct tax can be laid without apportionment merely by calling it a transfer tax or death duty. Regard must be had to the substance of the matter and not to mere forms of expression. When it is said that a direct tax is one laid on property by virtue of ownership, what is plainly meant is that it is laid on property in fact, rather than upon a taxable use of property, and when it appears that the intent of the Act is not to impose a succession tax but to reach a certain amount of property collectively considered and to make it pay a tax at a progressive rate, based upon the value of the property at death, although it has been irrevocably transferred not only prior to the death but prior to the passage of the Act which imposes the tax, we submit that it is clear

that the tax thus laid is essentially a direct tax upon the property.

The argument which was advanced in the lower Court in two of the cases now before this Court, to the effect that the tax is only upon the property transmitted at death, and that the property transferred prior to death and, indeed, prior to the Taxing Act, is considered only for the purpose of measuring the tax, remains to be considered.

This appeal to the well known discretion of Congress in the measurement of excise taxes must fail when applied to the construction of the Act here under discussion. Resort was had to the same argument in *Knowlton* v. *Moore,* 178 U. S. 41, but met with the following blunt dismissal by Mr. Justice White (page 76):

> "The principle on which such construction rests was thus defended in argument. The tax is on each separate legacy or distributive share, but the rate is measured by the whole estate. In other words, the construction proceeds upon the assumption that Congress intended to tax the separate legacies, not by their own value, but by that of a wholly distinct and separate thing. But this is equivalent to saying that the principle underlying the asserted interpretation is that the house of A, which is only worth one thousand dollars, may be taxed, but that the rate of the tax is to be determined by attributing to A's house the value of B's house, which may be worth a hundredfold the amount. The gross inequalities which must inevitably result from the admission of this theory are readily illustrated."

If the Government's theory of measurement were upheld in the present case, it would go far

beyond any decision thus far made under such power. This is not a case like *Flint* v. *Stone Tracy Co., supra,* where the inclusion of non-taxable factors in the measurement of the tax was incidental merely and indeed necessary to produce fairness of operation between tax-payers. It is not necessary to repeat the citation of authorities on this point contained on pages 80 to 88 of the brief of the plaintiffs-in-error in No. 236.

If property transferred prior to the Act were included to measure the tax payable by reason of the transfer which took place subsequent to the Act, such inclusion would not be incidental. There is no necessary correlation between the two transfers. There is no inconvenience in their separation. They rest upon wholly different theories. And we are by no means willing to assume that, if Congress had been advised that it could not reach the past transfer by a tax operating directly upon it, it would have resorted to the subterfuge of measuring a tax which it could validly lay by the value of the property, the transfer of which was beyond its constitutional power to reach without apportionment.

We cannot too often repeat that, unlike prior death duties imposed by Congress, the present Estate Tax Law is imposed upon the donor on account of his transmission of property upon his death. To tax him through his executor, upon the value of property which he has not owned for years prior to the passage of the Act is, plainly speaking, a tax upon one man based upon property owned by another. It is plainly beyond the pale of any power which Congress has ever been conceived to possess over taxation.

Moreover, while we are fully aware that the argument that a Federal death duty interferes with

the control by the States over the devolution of property, was fully considered and laid aside in *Knowlton* v. *Moore*, and *New York Trust Company* v. *Eisner*, *supra*, we do suggest that those decisions do not answer the case of one who, like Mrs. Cummings, has by the Government's construction of the present law been wholly deprived of any practical enjoyment of the privilege, which it has always been supposed that the State of New York conferred upon its citizens, of disposing of some part at least of the estate which she was fortunate enough to own at death, by will or under the intestate laws of that state.

As Judge Rose said in *Curley* v. *Tait*, 276 Fed. 840, 844:

> "The present act, unlike its federal predecessor, is an estate tax, and not a tax upon the right to receive. If the government's contention be sustained, the tax will come, not as in Wright *v.* Blakeslee, supra, or in Cahen *v.* Brewster, 203 U. S. 543, 27 Sup. Ct. 174, 51 L. Ed. 310, 8 Ann. Cas. 215, out of the sum received by the one to whom the taxed property passes, but will be collected from one to whom it does not. Neither the Johns Hopkins Hospital nor the Johns Hopkins University will pay one cent of it. It will all come out of the property going to Grafflin's widow. Would Grafflin have made any of these transfers, had he understood by so doing he would impose a charge upon his wife of upwards of $23,000? The care with which certain limitations were introduced into each of the agreements would seem to make it highly improbable.
>
> "It is easy to conceive of a case in which a man of large estate might, before the passage of the act of 1916, have made considerable transfers to relatives, friends, or to charitable or educational institutions in somewhat

> the same fashion as Grafflin did, reserving for some residuary legatee a comfortable and even handsome balance of his estate. If the government is right, such legatee might be stripped of every penny of the testator's bounty. The taxes on the transferred property might amount to more than the residue of the estate, large as the testator had every reason to suppose it would be, and the Supreme Court, in language already quoted, has held that the courts will not assume that Congress intended any such consequences. Union Pacific R. R. Co. *v.* Snow, supra."

We recognize, of course, that there can be no test of absolute equality in taxation. Incidental inequalities are bound to occur. But if the present act be construed in accordance with the contention of the government, inequalities deliberately enacted will be sanctioned. A theory of measurement of a tax which involves the possibility of wiping out a man's entire estate by reason of something which he has done before the act was passed and which he is powerless to undo after its passage, is not taxation but confiscation. Taxation had a definite meaning to the framers of the Constitution. That the power of Congress to levy exactions is subject to certain "limitations arising from those fundamental conceptions of free government which underlie all constitutional systems" has never been denied by this court. (*Knowlton* v. *Moore*, 178 U. S. 41, 77; *McCray* v. *United States*, 195 U. S. 27.) And when an exaction transcends those limitations it is void.

We submit that the constitutional requirements that what is in fact a direct tax must be apportioned, may not be avoided by calling it the measure of an excise tax. No power existed to tax these transfers directly by excise taxation.

There was neither necessity, reasonableness nor convenience to justify making them the measure of an excise tax upon another transfer. The imposition of a tax measured by the value of the property at the time the tax was levied, no matter when the transfer was made, can only be considered, in the absence of a use of the property justifying an excise, as a direct tax upon that property. This being the substance of the matter nomenclature is unimportant.

The limitations of the Constitution over Congressional action are no less important when they are express than when they are implied. In *Evans* v. *Gore*, 253 U. S. 245, the attempt was made to support the taxation of the income of a Federal Judge from his position by calling its inclusion a mere incident of a tax imposed with respect to his income. The court, however, rejected such a theory and held that it would be an attempt to reach income which impliedly was exempt from taxation and that such an attempt was ineffectual.

The power of the court to look through the form of a taxing act to its true substance and effect, should certainly be not less broad than the judicial power to pierce the veil of the corporate form, for instance, to ascertain the truth of transactions which would otherwise be hidden. Illustrations leap to the mind. Thus there is no doubt that Congress has power to levy an excise tax upon the transfers of shares of corporate stock based upon the value of that stock; but suppose Congress in taxing the transferor of stock certificates attempted to measure the tax, not by the value of the stock transferred, but by the aggregate value of all the stock which the particular transferor had ever transferred in the past.

Would there be the slightest question that such a levy was beyond the constitutional power of Congress? And is there any substantial distinction between such an attempted tax and a tax upon the transfer of an estate passing at death measured by the present value of all the property which the decedent had given away in his lifetime? Such a tax is either a direct tax, void because unapportioned, or an exaction which does not fall within the meaning of taxation at all and so void as constituting a deprivation of property without due process of law.

III.

If the act be construed so as to impose liability upon the transferee under a transfer irrevocably effected prior to the passage of the act, it is beyond the constitutional power of Congress.

All the arguments set forth in point two above apply with equal force to the attempt to impose a secondary liability, in case the executor has not sufficient estate in his hands to pay the tax, upon the transferee under a transfer validly and irrevocably made before the passage of the Act. In addition, it is not possible for the Government in cases of this sort, of which No. 303 is an example, to fall back upon the measurement theory discussed in the last point, for by hypothesis the net estate, the transfer of which according to that argument is the only thing taxed, has been completely exhausted before the liability of the transferee can attach.

The authorities that a transfer tax cannot be imposed upon a past transfer apply as well where the attempt is made to collect the tax from the transferee as where it is made payable by the transferor, and indeed most of the state court cases to which reference has been made have been of the former sort, for they arose under inheritance tax laws.

Nor is it admissible to construe the Estate Tax Law as being dual in character, i. e., laid upon the transmission of property insofar as the executor is concerned, but upon the receipt of property insofar as the liability of the transferee is concerned. We have already pointed out that from its essential characteristics this Act cannot be construed as levying a tax upon the receipt of property, and that the nature of the tax is not altered by the imposition of a secondary liability upon the transferee.

It must never be overlooked that the liability of the transferee is secondary only and this fact is of cardinal importance in the construction of the Act. If the Act imposed in any sense a tax based upon the receipt of property by the transferee, the transferee would be made primarily liable to pay the entire tax based upon the amount of the property which he received, and if the executor paid a part of his tax the executor would be given a right of reimbursement from the transferee; instead the transferee paying the tax is given a right of reimbursement against the executor, except in cases in which the funds in the hands of the executor have already been completely exhausted.

The significance of the absence of any provision, in the case of an executor who has sufficient

assets of the decedent to pay the tax, for recourse to the transferees of property transferred in the decedent's lifetime is emphasized by the amendment introduced in the Revenue Act of 1918. By Section 402 of that Act the amount of life insurance upon the decedent's life in excess of $40,000 receivable by beneficiaries other than the executor or administrator is to be included in computing the value of the gross estate. Under Section 408 of that Act the executor is entitled to recover from such beneficiary "such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies bear to the net estate." This express provision for recovery by the executor against the beneficiary in the one case negatives the possibility of implying such a right in other cases.

Moreover, any attempt to impose the tax upon the transferee upon the theory that it is levied by reason of his receipt of property, would fall under the rule of *Knowlton* v. *Moore*, *supra*, that an Act could not validly be construed so as to determine graduated rates which the transferee should be obliged to pay upon a transfer to himself, by reference to the amount of property that had been transferred to others.

We may therefore reiterate that decisions such as *Wright* v. *Blakeslee*, 101 U. S. 174, made under succession tax acts, imposed upon the receipt rather than upon the transmission of property, will not avail to sustain the attempt to impose liability upon the transferee under the present Act on account of a transfer made prior to its passage. The transferees do not pay with respect to any "succession" but with respect to certain *quantum of property*, and then only because the

entire tax as computed upon the entire supposed constructive estate of the decedent has not been paid out of assets left by him.

As above pointed out the cases under succession taxes, even if they could be regarded as applicable to the present act, would not justify this attempt to tax a past transfer. Succession taxes are imposed upon the devolution of title to property on the occasion of death. So far as the power of the State to impose such taxes is concerned, they have been sustained upon the ground that the right to receive property on the occasion of death is not a natural right but is a privilege granted by the State and subject to recall in whole or in part before this privilege is fully exercised. *Mager* v. *Grima*, 8 How. 490; *United States* v. *Perkins*, 163 U. S. 625; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283; *Cahen* v. *Brewster*, 203 U. S. 543.

Where, however, the privilege has been fully exercised and the devolution of title has been complete before the State exerts its power over the succession, there is nothing upon which a succession tax may operate. As stated by Mr. Justice Holmes in *Chanler* v. *Kelsey*, 205 U. S. 466, 480:

> "* * * such a tax cannot be levied except where there is a succession, and when some element or step necessary to complete it still is wanting when the tax law goes into effect. If some element is wanting at that time, the succession depends, for taking effect, on the continuance of the permission to succeed or grant of the right on the part of the State; and, as the grant may be withdrawn, it may be qualified by a tax. But if there is no succession, or if the succession has fully vested, or has passed beyond dependence upon the

> continuing of the State's permission or grant, an attempt to levy a tax under the power to regulate succession would be an attempt to appropriate property in a way in which the Fourteenth Amendment has been construed to forbid. No matter what other taxes might be levied, a succession tax could not be, and so it has been decided in New York. *Matter of Pell*, 171 N. Y. 48, 55; *Matter of Seaman*, 147 N. Y. 69."

While this statement is contained in a minority opinion, we submit that it represents a view of the nature of a succession tax which has at all times commanded the assent of this court. The decision of the majority in that case was not opposed to this principle. In that case the State of New York had imposed a transfer tax upon the exercise of a power of appointment which took place after the taxing act went into effect. The power, however, had been created by a trust deed executed prior to the passage of the act. The court sustained the tax as within the constitutional power of the state, not upon the ground that there was a coming into possession or enjoyment after the act took effect, or upon the ground that the State could tax successions retroactively, but solely upon the ground that until the power of appointment was exercised the estate had not become vested in the beneficiaries. The plain intimation of the opinion was that if a vested interest had been created prior to the passage of the act, the State could not impose a succession tax, whatever its right to impose other taxes might have been. The court places its decision squarely upon the ground that no estates had become vested until the donee of the power executed the same after the passage of the transfer tax law. Mr. Justice Day, writing for the court, said (pp. 473, 474):

"However technically correct it may be to say that the estate came from the donor and not from the donee of the power, it is self-evident that it was only upon the exercise of the power that the estate in the plaintiffs-in-error became complete. Without the exercise of the power of appointment the estates in remainder would have gone to all in the class named in the deeds of William B. Astor. By the exercise of this power some were divested of their estates and the same were vested in others. It may be that the donee had no interest in the estate as owner, but it took her act of appointment to finally transfer the estate to some of the class and take it from others."

It was thus recognized by the court that in order to sustain the tax as a succession tax, it was necessary to find that some element was wanting with regard to the vesting of title to the succession until the exercise of the power of appointment.

It may be said that we know of no authoritative decision in which a tax has been upheld as a succession tax when it appears that the succession has completely vested in title prior to the passage of the Taxing Act, (compare *Matter of Lansing*, 182 N. Y. 238; *Minot* v. *Treasurer and Receiver General*, 207 Mass. 588).

How much more conclusively does the rule, that no tax can be applied to a transfer where the vesting of title has been fully effected prior to the passage of the Act, govern a tax upon the transmission of the decedent's estate, rather than upon the receipt of a succession. The decedent has completed the transfer at a time when it was subject to no tax. He had no power to transfer or in any manner affect the title to the property after the passage of the Act. No kind of transfer took

place upon his death. Nothing happened upon his death which would furnish the occasion of an excise duty.

We submit that an exaction of money from one who has been in the past given property, because the person who transferred it to him at a time when the transfer was not taxable, has since died, is beyond the pale of excise taxation. If a tax at all, it is a direct tax levied upon the property of the transferee by reason of his ownership of it,—an ownership validly and completely acquired before the Act took effect. At the time of the passage of the Estate Tax Law of 1916, property which had been theretofore transferred by deeds in contemplation of death, or to take effect in possession or enjoyment at or after death,—if such deeds were not ambulatory,—differed in no respect, so far as the validity of the title was concerned, from property which had been transferred by any other sort of deed. The property was as completely owned by the transferee as any other property.

A tax laid upon the transferee of that property is in truth and substance a tax upon the property, because of its ownership by the transferee, and hence void if unapportioned.

IV.

The Estate Tax Act of 1916 should not be construed so as to work oppression or disturb vested rights or raise doubts with respect to its constitutionality. Such a construction is neither necessary nor natural.

It is in the light of the constitutional principles already discussed that the question of the construction of the act should be approached. It is manifest that the power of Congress to reach back into the past and impose a singularly oppressive levy with respect to transactions which had been completed prior to the passage of the act, is, to say the least, doubtful. The court will, therefore, not give a construction to the act which raises such doubts unless this construction is imperatively required by the language used by Congress.

Moreover it should not be assumed that Congress deliberately intended to impose an arbitrary and unreasonable exaction in the guise of an excise tax. If the act may be construed so as to operate justly, it should be assumed that it was the intent of Congress that it should so operate. If this court is to impute to Congress an intention to enact a plain injustice, it should find this intent in the most clear and unmistakable language.

On the contrary, when the provisions of the act are examined it is submitted that they not only do not require any such construction but that they do not even justify it. The dominant intent of Congress was to impose a tax "upon the transfer of the net estate of every decedent dying after the passage of this act." The experience of the States had shown that certain forms of conveyance had

been availed of to avoid the imposition of inheritance taxes. Congress did not intend that its estate tax should be thus avoided. It, therefore, provided that there should be included in the net estate not only the property actually passing at death, but property passing under conveyances which might be resorted to in order to avoid the tax imposed. The general intention of Congress was wholly prospective. Thus in Section 209, the act provides:

> "If the decedent *makes* a transfer of, or *creates* a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death * * * * the transferee or trustee shall be personally liable for such tax," (italics ours).

Nothing could show more clearly the intent of Congress than this provision. It realized that it was imposing a new form of taxation. It also knew that attempts would be made to avoid the tax by transfers *inter vivos*. It knew that if a person transferred all his property to trustees he would leave no estate out of which the Federal estate tax could be paid. It, therefore, provided that in such cases the property and the transferee should be liable for the tax to the extent of decedent's interest at the time of the transfer. The language used is wholly prospective and it shows clearly that the motive and purpose of Congress, in including within the net estate the value of property transferred by such deeds, was to prevent the avoidance of the tax. There is not a line in the act which indicates an intent upon the part of Congress to interfere with estates that had already become vested, or to impose a tax upon transfers which, having been made prior to the

Act, could not possibly have been made to avoid its provisions.

The argument of the Government wholly ignores not only these broad considerations of the intention of Congress, but also the literal terms of the act as expressed in Section 209 above quoted. It rests its case entirely upon the isolated phrase "at any time" in Section 202. Nothing could be added to the powerful analysis of this argument in the brief submitted by plaintiffs in error in these cases. There is no necessity for repeating it here.

The language of the Act may be given full significance without overriding the dominant intent of Congress as expressed in the act and without imputing to Congress a desire to levy its estate taxes in an oppressive, arbitrary or unequal manner.

Respectfully submitted,

ROUNDS, SCHURMAN & DWIGHT,
Attorneys for *amici curiae* above named.

CHARLES E. HUGHES, JR.,
ALLEN S. HUBBARD,
of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1921.
No. 236.

UNION TRUST COMPANY OF SAN FRANCISCO and ALBERT LACHMAN, as executors of HENRIETTA S. LACHMAN, deceased,

Plaintiffs-in-error,

vs.

JUSTUS S. WARDELL, United States Collector of Internal Revenue for the First District of California, et al.,

Defendants-in-error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF OF MANSFIELD FERRY

FILED AS AMICUS CURIAE, AND ON BEHALF OF THE FARMERS' LOAN & TRUST COMPANY, Trustee, UNDER A TRUST CREATED BY MARIE LOUISE MACKAYE.

C. ALEXANDER CAPRON,
RUSSELL L. BRADFORD,
Of Counsel.

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Supreme Court of the United States.

October Term, 1921.

Union Trust Company, of San Francisco, and Albert Lachman, as Executors of the Last Will and Testament of Henriette S. Lachman, deceased, *Plaintiffs in Error,* *vs.* Justus S. Wardell, United States Collector of Internal Revenue for the First District of California, and John L. Flynn, United States Collector of Internal Revenue for the First District of California.	No. 236.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

Brief of Mansfield Ferry as *amicus curiae,* and on behalf of The Farmers' Loan and Trust Com-

pany, Trustee, under a trust created by Marie Louise Mackaye, dated May 20th, 1914.

This brief, by permission of the Court, is filed by the undersigned as *amicus curiae* and on behalf of The Farmers' Loan and Trust Company, Trustee, under a deed of trust created by Marie Louise Mackaye under date of May 24, 1914, in which trust deed the income for life was to be paid to said Marie Louise Mackaye, and the property conveyed by this trust deed was upon the death of said Marie Louise Mackaye to go to her grandson, by marriage, Harold Steele Mackaye, absolutely and forever.

The facts in relation to the transfer under the deed of trust above mentioned are as follows: On the 24th of May, 1914, more than two years prior to the passage of the Revenue Act of September 8, 1916, Marie Louise Mackaye executed a deed of trust whereby she assigned and transferred to The Farmers' Loan and Trust Company, certain securities of the value at the date of her death of $83,389. The terms of the trust were that the income should be paid to the said Marie Louise Mackaye during her life, and that after her death leaving her grandson by marriage, Harold Steele Mackaye her surviving, the whole of the trust fund should be paid to the said Harold Steele Mackaye absolutely and forever. Further provision was made for disposition thereof in the event that said Harold Steele MacKaye should predecease the said Marie Louise Mackaye. The deed further provided that a portion of the principal of the trust fund, up to an amount equal to one-fourth of the value thereof at the time of the execution, should be paid to the said Marie Louise MacKaye should she require and direct the same in writing. Except as to this one-fourth, the

transfer was absolute and there was no power of revocation contained in the deed of trust.

Said Marie Louise Mackaye died on the 11th of December, 1916, intestate, being at the time of her death, a resident of Paris, France, and leaving no estate.

Notwithstanding the fact that this transfer was made long prior to the passage of the Act of 1916, and notwithstanding the fact that at the time of her death, Marie Louise Mackaye was a resident of Paris, France, over whom this Government had no jurisdiction, the Commissioner of Internal Revenue assessed a tax on the property held by the trustee at the date of death of the said Marie Louise Mackaye, which tax was paid under protest by the trustee.

The questions raised by the appeal of the Union Trust Company, of San Francisco, and Albert Lauchman, executors, plaintiffs in error, from the decision of the lower Court and the facts upon which these questions arise, have been clearly stated by the brief submitted on behalf of the plaintiff in error, and we shall not, therefore repeat what has there been stated.

We desire to express our hearty approval of the entire argument presented by counsel for the plaintiffs in error in their brief. In fact, we feel after careful consideration thereof, that there is little that can be added to the force of the argument there set forth. However, the decision of this case may have such far reaching effect that we deem it not inappropriate to present to this Court, our views in relation to certain of the questions involved, particularly those which deal with the constitutionality of the Act, if the construction contended for by the Government is correct.

We are in accord with the argument set forth in the brief of the plaintiffs in error to the effect that it was not the intention of Congress by the Act of September 8, 1916, to impose a tax upon transfers which had been made prior to the passage of that Act, and further that if the Act were construed to have a retroactive effect, there would be such grave doubts as to its constitutionality that this Court should construe the Act to have only a prospective effect. We feel we can add nothing to the arguments in relation to these matters, and shall therefore confine our argument to the effect of the Act, if it should be construed to have a retroactive effect on past transfers. In so doing, it is not our purpose to ask this Court to first determine whether it would or would not be constitutional for Congress to pass such an Act having a retroactive effect, but merely to add to the strength of the argument presented by the plaintiffs in error, that if it is doubtful that the Act is Constitutional, if given a retroactive effect, then this Court must give such construction to it as would relieve the Act of this question.

If the Act is to be given a retroactive effect, the tax can be sustained, if at all, only as an excise tax. If it is a tax on property, it does not comply with Sections 2 and 9, Article I of the Constitution, which provides the method of apportionment of direct taxes among states.

If the act is to be construed as imposing an excise tax, which takes into consideration past transfers, then it can be sustained, if at all, on three but only three, theories:

(1) That the Government has the right and by the Act in question has imposed a tax on past transfers;

(2) That the Government has the right and the Act does tax the coming into possession of remainders or future estates created by transfers taking effect prior to the passage of the Act; or

(3) That the Act does not tax past transfers but in measuring the tax on transfers made subsequent to the passage of the Act, takes into consideration the value of property transferred prior thereto.

It is submitted that Congress did not intend to impose a tax on any of these theories and that if it did do so, the Act cannot be sustained.

POINT I.

An Act that attempts to assess a tax upon the transfer of property that has been completed theretofore results in an assessment of a tax on the property itself.

The briefs submitted on behalf of the plaintiff in error demonstrates the fact that the transfer of the remainders in the instant case had been completed long prior to the enactment of the law under which the tax was assessed, unless it can be argued that a transfer of a remainder is not complete until it vests in possession. Later in this brief, we shall discuss this question as to the right of the Government to assess a tax on the right of the owner of a remainder to take possession thereof, but for the purpose of this point we shall assume that the transfer of the remainders in question were completed in all respects.

In the case of Shwab *v.* Doyle now pending before this Court (October Term 1921, Docket No. 200), the transfer there involved was that which was effected by a gift which was held to have been made in contemplation of death but there not only the title to the property, which was the subject of that gift, had infeasibly vested in the donee but the property itself had also vested in the donee in possession and enjoyment. Section 202 of the law makes no differentiation between a gift made in contemplation of death and a gift intended to take effect in possession or enjoyment at or after death. It is the contention of the Government that both classes of gifts, although made before the passage of the taxing act, are subject to the tax thereby imposed. It would seem difficult to sustain the Act as to one class of gifts and not as to the other. The Courts have recognized the fact that to attempt to tax a transfer that has already taken place is an anomaly. They have taken the position that after the transfer is complete and the rights of the parties fixed and determined there is nothing left to tax.

In the Matter of Lansing, 182 N. Y. 238, an attempt was made to tax a remainder interest which had been created in 1869 long prior to the enactment of the law of 1897 under which it was attempted to asses a tax. The Court there stated at page 247:

> "Where there is no transfer there is no tax and the transfer made before the passage of the act relating to taxable transfers is not affected by it. * * *"

In Chanler *v.* Kelsey, 205 U. S. 466, on page 480, Mr. Justice Holmes in his dissenting opinion states:

> "If * * * a given state tax must be held to be a succession tax in order to maintain its validity, or if in fact it is held to be a succession tax by the State Court of which it is the province to decide that matter, it follows that such a tax cannot be levied except where there is a succession, and when some element or step necessary to complete it still is wanting when the tax law goes into effect. * * * if there is no succession, or if the succession has fully vested, or if passed beyond dependence upon the continuing of the State's permission or grant, an attempt to levy a tax under the power to regulate succession would be an attempt to appropriate property in a way which the Fourteenth Amendment has been construed to forbid. No matter what other taxes might be levied, a succession tax could not be, and so it has been decided in New York." (Citing Matter of Pell, 171 N. Y. 48, 55; Matter of Seaman, 147 N. Y. 69.)

These words are entirely appropriate in considering the act of 1916 if we substitute in place of the word "succession" the word "transfer".

Mr. Justice Holmes there recognized that a tax upon succession which had been completed could not be a tax on the succession and it is equally true that to attempt to assess a tax upon a past transfer is not a tax on the transfer. While the majority of the Court decided that the State of New York could properly assess a tax on the exercise by will of a power of appointment, which power had been created prior to the passage of the tax law, the above statement and principle of Judge Holmes was not and cannot be questioned.

What is the nature of a tax upon a past transfer? It is a tax on the property itself.

An excise tax can only relate to the exercise of some privilege and after the privilege has been exercised it is no longer the object of an excise tax. "When the privilege has ripened into a right it is too late to impose conditions of the character in question." (Matter of Craig, 97 App. Div. 289; affd. 181 N. Y. 551.)

All excise taxes affecting as they do the exercise of a privilege must from their very nature act prospectively only. They are supported on the theory that the taxpayer is not obliged to pay the tax unless he exercises the privilege. To assess a tax on the doing of an act after that act has been completed so that the taxpayer is no longer in a position to elect whether he will or will not exercise his privilege, while it might be denominated an excise tax, would no longer be such, but would constitute a direct tax either on property or against the taxpayer which he could in no way avoid. If the tax is in its nature an absolute and unavoidable demand it lacks one of the chief characteristics of an excise tax. (*Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 151-2.)

Chief Justice Fuller in delivering the opinion of the Court in Pollock *vs.* The Farmers' Loan and Trust Company, 157 U. S. 429, at page 558 stated that:

> "Ordinarily all taxes paid primarily by persons who can shift the burden upon someone else, or who are under no legal compulsion to pay them, are considered indirect taxes; but a tax upon property holders in respect of their estates, whether real or personal, or of the income yielded by such estates, and the payment of which cannot be avoided are direct taxes."

It is impossible to conceive of any excise or privilege tax acting restrospectively which is not thereby converted into a tax which cannot be avoided by the taxpayer and is, therefore, a direct tax. If this Court should determine that the legislative branch of our Federal Government may in the name of an excise tax impose a tax on privileges which have heretofore been exercised, we must then recognize the fact that in the name of such taxes the Federal Government may confiscate all property, both real and personal, in the United States. This conclusion is inevitable if Congress has unlimited power to enact retroactive excise taxes.

If Congress may pass a law taxing one class of past transfers we should find it difficult to oppose a law which would assess a tax on the last transfer of all property both real and personal in this country whether that tax was a fraction of 1% or was a tax of 99% of the present value of the property transferred. If any property should escape such a tax by reason of the fact that it had never been transferred but had been newly created, then it would seem that Congrss could assess a retroactive excise tax on the manufacture or creation of all such newly created property which had not been transferred. If Congress should attempt to lay such a tax it is submitted that this Court would have no hesitation in finding that this was unconstitutional, in that Congress was in effect imposing a direct tax upon property and not an indirect tax upon the exercise of a privilege in relation to such property.

But where is the line to be drawn? Is it possible to say that Congress may impose a tax upon transfers which took effect last year or the

year before, or all transfers which took effect in the last five years? If Congress may go back one year or five years it may then go back to the time of the inception of this Government. The only logical conclusion is that Congress cannot enact laws imposing taxes on the past exercise of privileges unless it complies with the constitutional limitations in relation to the imposition of the direct taxes on property, if in fact property can be reached in even this manner.

As the plaintiffs in error have pointed out in their brief the state courts have repeatedly declared that transfer and inheritance tax laws similar in charateer to the act now in question cannot act retroactively even though they can impose direct taxes unapportioned and where possible to do so have uniformly construed them as having only a prospective effect, and where the language of the acts in question was unequivocal in referring to past transfers the courts have declared such acts to be unconstitutional so far as they relate to such past transfers. Matter of Pell, 171 N. Y. 48; Matter of Vanderbilt, 172 N. Y. 69; Commonwealth *v.* Wellford, 114 Va. 381; Lacey *v.* State Treasurer, 162 Iowa, 483; State *v.* Safe Deposit and Trust Co., 132 Md. 252; Eury *v.* The State, 72 Ohio, 448; Metter *v.* McLaughlin, 141 Mich. 425; State *v.* Probate Court of Washington County, 102 Minn. 268.)

"Undoubtedly a tax may be *in form* a privilege tax and yet, *in substance*, may be a direct tax on property." (Kansas City Railway Co. *v.* Botkin, 240 U. S. 235). A mere matter of nomeclature cannot change a direct tax on property into an excise tax. (Dawson *v.* Kentucky Distilleries Company, 255 U. S. 288, 292.)

We are not unmindful that the Court in *Brushaber v. Union Pacific R. R. Co.* (240 U. S. 1), held that there was no impropriety in Congress assessing a tax on income which had accrued prior to the passage of the act, but subsequently to the enactment of the sixteenth amendment. The Court there approved and relied upon the decision in *Stockdale v. Atlantic Insurance Co.* 20 Wall, 323. This latter case also dealt with an income tax law, and it is not therefore proper to assume that this Court intended to or did decide that Congress had the power in general to levy excise taxes which would act retroactively. While the Court in the Brushaber case did indicate that income taxes, although imposed pursuant to the sixteenth amendment of the Constitution, might still be regarded for some purposes as excise taxes, nevertheless, the Court must recognize that there is a very great distinction between income taxes and other excise taxes imposed upon the exercise of certain privileges.

The reasoning of this Court in *Pollock v. Farmers' Loan and Trust Company* (157 U. S. 427 and 158 U. S. 601), that income taxes in their final analysis are equivalent to direct taxes upon the property from which they are derived, is convincing. The court at page 626 quoted with approval the following statement of Hamilton: "What, in fact, is property, but a fiction without the beneficial use of it? In many cases indeed, the *income* or *annuity* is the property itself." As indicated in that case, an income tax has that characteristic of an "absolute and unavoidable demand" which is lacking in connection with ordinary excise taxes.

Once we recognize that a tax is unavoidable and inescapable, and that it is proper to levy such a tax, it appears that there is no particular impropriety in making such a tax apply retroactively. Whether there is or is not a tax upon the income from property, it is natural and inevitable that the owners of such property shall desire to enjoy the use or income of that property, and it does not therefore shock the sense of justice if a tax is imposed on the income derived from that property in a preceding year. In other words, if the tax had been imposed prior to the collection of the income during that year instead of after its collection, it is not to be supposed that it would have altered the conduct of the owners of the property in the least particular. They would have still desired to collect such income. They have not been permitted to do something which they would not have done had they known that their act was to result in the imposition of a tax. Similarly, if a tax is imposed on property, it is not material whether it is denominated a tax for a previous year or for the current year.

But this cannot be said in relation to strictly privilege or excise taxes. In all such taxes, there is an element of volition on the part of the tax payer. He may or may not exercise his privilege and subject himself to the payment of the resulting taxes.

While we do not find that the question of the retroactive character of the Corporation Income Tax Act of 1909 has been considered by this Court, that act was declared constitutional in *Flint v. Stone Tracy Co., supra.* That act did not take effect until August 5, 1909, and it did assess a tax on the income of corporations thereby af-

fected, for the whole of the year 1909. While that act was in form on excise tax on the right of the corporations to do business, it did apply to the income of the corporations thereby affected, and might, therefore, be classed with the other income taxes above referred to. For the word "income" is given the same meaning in all of the Income Tax Acts that was given to it in the Federal Corporation Excise Tax Act of 1909. (See Merchants Loan & Trust Co. *v.* Smietanka, 255 U. S. 509, 41 Supt. Ct. 386.) However, the Court in the Flint case recognized that the act did not impose an absolute and unavoidable demand. Mr. Justice Day there stated, at pages 151-2: "The requirements to pay such a tax involves the exercise of privileges, and the element of absolute and unavoidable demand is lacking. If business is not done in the manner described in the statute, no tax is payable." The act in so far as it attempted to lay a tax measured by the income for the full year 1909, undoubtedly was correct in theory in assessing a tax on the privilege of doing business after its passage, but measuring the amount of the tax by the income collected during the full year. However, it would appear from the language used by Mr. Justice Day that if a corporation had dissolved on the day that the act took effect and thereafter ceased to do business as a corporation, the Government could not in that case have collected a tax upon the income which had been received by the corporation from the first of January, 1909, to the date the act took effect. If it had attempted to levy a tax in such an instance, then the tax would have constituted an absolute and unavoidable demand.

As the power to tax also involves the power to destroy, it might be possible for our Federal Gov-

ernment to assess an excise tax on the right of corporations to continue to do business in the future, which would be equal to the total amount of their net incomes in the future. The Government might even go to the extent of saying that for the privilege of continuing to do business in the future, it would assess a tax equal to the total value of all the present assets of a corporation. In neither of these instances, however, would the tax be absolute and unavoidable. The tax payer might relieve itself of the obligation to pay the tax by dissolving or ceasing to do business as a corporation. However, if Congress should lay a tax on the past exercise of the privilege of doing business as a corporation, an entirely new element is injected. If the Government should say, for the privilege of doing business as a corporation which you have heretofore exercised, we shall assess a tax equal to the present value of your present net assets, that could no longer be regarded as a proper exercise of the governmental power to tax excises. It would in effect be a direct tax upon the assets of the corporation and a confiscation of the property of the corporation. If the tax were merely a percentage of the value of the assets of the corporation rather than the whole thereof, it would still be a direct tax.

We must therefore conclude that any act which purports to tax a privilege already exercised is no longer an excise or indirect tax, but a direct tax upon the property itself, or a taxing of property in violation of the Fifth Amendment.

As this law was intended to lay the tax upon the privilege of transfer it is naturally essential that the substance be there on which the law could operate. It must be assumed that there is a transfer in order that the tax may become op-

erative. If there is no transfer there is nothing done, and the statute has no application. To strain the reasoning and assume that transfers previously made would come within the purview of the operation of the law, would be not to tax a thing that is being done or a privilege that is being exercised, but would be to tax the property itself or the ownership thereof. This is beyond the power of the Federal Government without an apportionment of the tax.

In the case at bar the property of Mrs. Lachman in question here had been transferred in 1901, more than fifteen years prior to the enactment of the Federal Estate Tax Act of September 8, 1916. She made no transfer after the act went into effect. So far as this property is concerned she had no property to transfer. Nothing could be done by her to dispossess herself of the title to the property other than that which she had done, and nothing more could be done by the remaindermen or transferees in order to have title vested in them than that which had been done. For the Court to now construe this act retrospectively so as to lay a *transfer* tax on this property would be to say the thing that has been done has not been done, and to conflict with the settled property laws of the State of California and rights of the present owners.

After the passage of the taxing act, Mrs. Lachman had no discretion in the matter. The transfer was completed. The thing had been done and was *fait accompli.* To now tax this transfer would not be the imposition of an indirect tax but would render it in effect a direct tax and one from which the decedent had no chance for escape, or choice of the exercise of discretion.

POINT II.

The Government has not sought to tax the coming into possession of remainder or future interests, and if it did so, the Act would be unconstitutional.

(a) *There is nothing in the Act to indicate that Congress intended to lay a tax upon the coming into possession of remainders or future estates.*

By Section 201 of the Estate Tax Act of September 8, 1906, "A tax * * * equal to the following percentages of the value of the net estate" is "imposed upon the *transfer* of the net estate of every decedent dying after the passage of this Act." In Section 202 in defining the gross estate of the decedent, it is provided that there shall be included therein the value at the time of the decedent's death of all property "to the extent of any interest therein of which the decedent has at any time made a *transfer*, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, * * *".

There is no word in the act which purports to assess a tax upon the coming into possession of future estates. It was as a transfer tax that it was reported by the Ways and Means Committee of the House of Representatives (Report No. 942, 64th Congress, First Session, p. 5). The Treasury Department has definitely stated in Treasury Regulation 37 revised to May, 1917, "This is a transfer tax law."

In view of the explicit language of the act, it would seem to be unnecessary to argue that it was

not the intention of Congress to impose a tax upon the coming into possession of future estates. However, the Government has urged that the tax may be assessed on such a theory.

That it cannot be construed as taxing the coming into possession of remainders will be seen when we consider remainders taking effect not at the death of the decedent, but at sometime subsequently thereto. If A transfers property in trust to pay the income to him for life, and after his death to B for life and after B's death, remainder to C, the provisions of the tax law would assess a tax immediately upon the death of A on the value of the property constituting the trust fund at A's death, although the ultimate remainder would not vest in possession until after the death of the second life tenant. There is no tax on the coming into possession by the remainderman C, and when C does come into possession of the property, no tax is assessed to him or to any other person. Obviously, then it follows that this is not a tax on the coming into possession of property.

(b) To assess a tax upon the right to take possession is to lay a tax upon the property itself.

This Court has recognized that the Federal Government cannot lay an excise tax on the right to the use or enjoyment of property. This was the controlling feature in the decision in *Pollock v. Farmers' Loan and Trust Company, supra.*

The Court there recognized that to tax the income from property was for practical purposes, to tax the property itself. Quoting again the words of Hamilton, "What, in fact, is property but a fiction without the beneficial use of it?"

A similar question was passed upon in *Dawson v. Kentucky Distillery Co.*, 255 U. S. 288, where the Government sought to impose a tax of fifty cents on the withdrawal from bond of every gallon of whiskey. Mr. Justice Brandeis there stated that, " 'The whole value of the whiskey depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value.' To levy a tax by reason of ownership of property is to tax the property." The Court, therefore, held in that case, that the tax sought to be imposed was in fact a direct tax and that it could not be sustained, as it did not comply with the provisions of the Constitution in relation to direct taxes.

Since this Court has recognized the fact that to lay a tax upon the right of the owner of whiskey to take possession thereof, was to lay a tax upon the whiskey itself, it would seem to follow inevitably that this Court must also hold that to lay a tax upon a person's right to take possession of a remainder or future estate is to tax the remainder or future estate. There is no real distinction between the two cases.

There is no peculiarity about remainders or future estates. They are definite property rights which have been recognized by the courts from immemorial times. There is no practical distinction between a remainder and a reversion.

However, if we consider the right to take possession of a reversionary interest rather than a remainder, *eo nomine*, then there can be no distinction between the right of a citizen to repossess his property after the termination of some estate therein, which he has granted, and the right of a person to take possession of his whiskey after

placing it in bond. If the Government could assess a tax upon the right to take possession of a reversionary interest, it could under the guise of an excise tax lay a direct tax upon a large part of the real property in this country. It is obvious that the Court would not sustain a law which would assess a tax (although such tax were called an excise tax) on the right of a person to again take possession of his property, after the expiration of a lease which he had granted in relation thereto, prior to the passage of such law, and it should be equally obvious that to tax the taking possession of a remainder would be to tax the property itself.

By an Act passed in 1899, the Legislature of the State of New York attempted in unequivocal terms to assess a tax on the transfer of remainders, the title to which had vested prior to the enactment of the transfer tax statute, but which had not vested in possession or enjoyment at the time of the passage of such Act. The Courts were called upon to consider the validity of such an Act in the *Matter of Pell*, 60 App. Div. 286 (171 N. Y. 48). The Appellate Division came to the conclusion that the Act did not assess a tax upon the right of succession but that the tax sought to be imposed was a direct tax upon property. It stated at pages 291-2:

> "It may seem incongruous that a transfer tax act, which in principle was intended to impose a tax upon the right of succession, should be construed in such a way as to uphold the tax as one upon property. * * *
>
> "Our conclusion, therefore, upon the whole case is that if the tax sought to be imposed could only be supported upon the ground that it is a tax upon the right of succession, then

there would be objections, among them constitutional ones, to its validity; but that with reference to the estate here involved, if the act can be construed—as, with some misgivings, we think it can—as a tax upon property, it is free from constitutional objections, and the tax may be upheld."

The Court of Appeals stated at p. 55:

> "If these estates in remainder were vested prior to the enactment of the Transfer Tax Act there could be in no legal sense a transfer of the property at the time of possession and enjoyment. This being so, to impose a tax based on the succession would be to diminish the value of these vested estates, to impair the obligation of a contract and take private property for public use without compensation."

The higher court thus affirmed the conclusion which the Appellate Division had reached that the taxes could not be sustained as one on the transfers, but refused to follow the Appellate Division in its conclusion that the act could be sustained as a direct tax. The Court of Appeals found it was not the intention of the legislature to impose a direct tax and that as the act could not be sustained as one taxing transfers it was void.

The decision in the Pell case was expressed with such positiveness and the reasoning is so clear and irrefutable, that it has become the leading case in the country on this question, and has been cited with approval and followed in each state in the Union where a similar issue has been raised.

To amplify the force of this case or elaborate on its effect and soundness in view of the exhaustive and thorough manner in which the brief for the

plaintiff in error has presented it, would be a work of supererogation.

The Circuit Court of Appeals in the action of *Shwab* v. *Doyle*, 269 Fed. 321, now pending before this Court, in sustaining the assessment of the tax which was considered in that case, placed reliance upon the decision of this Court in *Wright* v. *Blakeslee*, 101 U. S. 174. We submit that this was unwarranted and that the decision in that case is not determinative of the question here presented. In that case, the Court was asked to determine whether the vesting in possession of "a bare contingent remainder expectant upon" the death of the owner of the precedent life estate, was a succession within the meaning of Section 127 of the Internal Revenue Act, of June 30, 1864, 13 Stat. at L. 287. That Act provided "that every past or future disposition of real property * * * by reason whereof any person shall become beneficially entitled in possession or expectancy, to any real estate or the income thereof, upon the death of any person dying after the passage of this Act, shall be deemed to confer on the person entitled by reason of any such disposition a 'succession'; * * *"

The terms of the will there considered, which had taken effect in 1846, devised to the executors thereof certain real property in trust to receive the rents and profits and apply them to Henrietta Wright during her life, with a gift over to her issue her surviving. All the Court decided was that upon Henrietta Wright's death, her children became beneficially entitled in possession to the property devised, and came within the definition of a succession as contained in the act. So far as the opinion of the Court shows it was not asked

to and did not consider whether our Federal Government could properly assess a tax on the taking possession of the property by the children of the said Henrietta Wright, under an act imposing a tax on transmission of property.

The Court below in *Shwab* v. *Doyle*, at page 324 of its opinion, after stating "The theory of taxation on account of transfers testamentary in character, is that death is the generating source of the tax" proceeded as follows:

> "The transfer is accordingly taxed only at the death of the transferor, no matter how long the transfer may precede death. Congress has accordingly included the two classes of transfers in one and the same section and subjected them, so far as terms go, to precisely the same treatment. In our opinion a transfer intended to take effect in possession or enjoyment after the grantor's death would under this statute, be taxable, although made before the passage of the act. *Wright* v. *Blakeslee*, 101 U. S. 174-6, 25 L. Ed. 1048. The natural inference would be in the absence of special evidence to the contrary, that the same result was intended as to transfers made in contemplation of death."

It will be noted, however, that in *Wright* v. *Blakeslee*, thus cited by the Court in support of this proposition, the generating source of the tax was not the death of the grantor, but the coming into possession of the property after the death of the owner of a precedent life interest.

Moreover the nature of the act of 1864 was essentially dissimilar from the act now under consideration. The act of 1864 assessed a tax on the succession or right of a person to receive property, whereas the present act is a tax upon the transfer of that property from the decedent.

In *Curley* v. *Tait* (276 Fed. 840), where the Court was considering the same issue here presented it was stated:

> "In *Shwab* v. *Doyle, supra,* the case of *Wright* v. *Blakeslee*, 101 U. S. 174, 25. L. Ed. 1048, was cited as authority for holding a similar statute retroactive. The act there construed imposed a tax upon the succession—that is upon the right to receive—and was levied on what passed to the heir, devisee, legatee, distributee or successor and not upon the estate. *Knowlton* v. *Moore*, 178 U. S. 41-42 et. seq. 20 Sup. Ct. 747, 44 L. Ed. 969. The distinction is neither pedantic nor technical, but, as applied to the matter now in hand is in the highest degree practical."

We therefore submit that the case of *Wright* v. *Blakeslee* is not an authority in opposition to the views which are here presented.

The case of *Moffitt* v. *Kelly*, 218 U. S. 400, is cited as authority for the proposition that the coming into possession of property is a proper subject of taxation. This Court did not pass upon the propriety of such a tax, but merely determined that the State of California ~~in~~ could pass~~ing~~ a law imposing a tax upon the coming into possession of already created and vested future interests, ~~did~~ and not thereby violate any provision of the Constitution of the United States, and held that it was entirely a local question, and that the determination of the Courts of California was conclusive, and as the sovereign state has the right to impose direct taxes upon property, the United States was not concerned with "the question whether or not the wife's interest under the circumstances was correctly subjected to the tax." *Moffitt* v. *Kelly*, supra, page 405.

(for no such statute was involved)

The case at bar does not present the question as to whether the Government may lay a tax upon an incomplete transfer where there is some privilege granted to the citizens which must be exercised before the transfer is finally completed.

In *Cahen* v. *Brewster*, 203 U. S. 543, 51 L. Ed. 310, where the Court sustained the tax laid by the State of Louisiana in an act which provided that the tax was "to be collected on all successions not finally closed and administered upon, and all successions thereafter opened", the Court held that so much of the succession as had actually vested in possession and was no longer in the process of administration, was not subjected to tax.

To the same effect is the decision in *Carpenter* v. *Pennsylvania*, 58 U. S. (17 How.) 456, where a tax upon an estate still in the course of administration, was sustained.

In this case, the tax payer exercised his privilege of using the probate machinery of the state in order to come into possession of his succession. The holding of the Court in these cases is in line with the case of *Patten* v. *Brady*, 184 U. S. 608, where the court held that a law assessing an additional excise tax on the manufacture, sale or removal for consumption or sale of tobacco, was valid, and could be sustained while the property was held for sale and before it passed into the hands of the consumer; also with that in *Billings* v. *United States*, 232 U. S. 261, where the Court sustained a tax on the use for pleasure of a foreign built yacht. In this case there was a continuing use of the yacht after the passage of the act.

In the instant case, no machinery of Government is availed of, or could be availed of, because everything necessary to give title to this property was

done fifteen years ago, and nothing of the transaction remained uncompleted.

POINT III.

The taxation of past transfers cannot be sustained upon the theory that the past transfers are not themselves taxed but may be used in measuring the tax upon the other assets of the decedent.

It is a cardinal rule of construction that any written instrument or act shall be given such interpretation that all parts of it shall be given effect.

It is not possible, however, to give effect to all parts of the act in question and at the same time sustain the tax thereunder of past transfers on the theory that the past transfers are not themselves taxed, but simply used as a measure of the tax to be imposed upon the assets of which the decedent dies possessed. This theory might be correct if the act only subjected the assets of which the decedent dies seized or possessed to the lien of the tax, but the Government has been careful to avoid the results which would arise if they limited the collection of the tax to such assets, and has explicitly provided in section 209 of the act that "if the decedent makes a transfer of or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death * * * and if the tax in respect thereto is not paid when due, the transferee or trustee shall be personally liable

for such tax, and such property to the extent of the decedent's interest therein at the time of such transfer, shall be subject to a like lien equal to the amount of such tax." (The lien referred to being that which is imposed upon the gross estate of the decedent by the previous paragraph of the same section.)

Is it possible to give effect to this provision of the law and at the same time say that past transfers are merely used for the purpose of measuring the tax to be imposed? It would seem obvious that this is not so. If the tax is only a tax on the transfer of the property of which the decedent dies seized and possessed, and is not a tax upon the past transfers, upon what possible theory can the Government require payment of a tax upon the transfer of property owned by the decedent by a person who has no share or interest in that property? If the Government could do this it could pass a law assessing a tax on A and then say if A does not pay his tax, it shall be paid by B, or that when A dies his estate shall pay a tax based on the value of B's property.

We submit that the Government must either reject this theory of measurement or claim that section 209 of the act is invalid and inoperative.

But the Government for its own protection, must assert the validity of section 209 of the act, and in fact it is doing so in this present action of *Levy v. Wardell*. In that case the decedent left no estate whatever and there was no administration on her estate. She had transferred prior to her death certain shares of stock, and at the time of such transfer the transferees agreed to pay her dividends on the stock during her life. The transfers of such stock had taken place on December 19,

1902, and January 14, 1903. The Government, however, has insisted that the act in question imposed a tax upon the transfer of that stock which was payable by the transferees.

Surely the Government cannot afford to take the position that no tax is incurred if a person transfers all his property before his death, by gifts which are made in contemplation of death or which take effect in possession at his death. If such is a correct construction of the statute, then a person might, without great inconvenience, avoid the payment of the tax, by disposing of his property by transfers *inter vivos*. Moreover, such an argument disregards the plain language of the act.

Referring again to section 209 of the law, we find that the tax which is imposed on the transferee is the "tax in respect" of the transfer to the transferee.

Consider the clear terms of section 201 "that a tax * * * equal to the following percentages of the value of *the net estate* to be determined as provided in section 203, is hereby imposed upon *the transfer of the net estate* of every decedent dying after the passage of this act * * *." Section 203 provides that the value of the net estate shall be determined by making certain deductions from the value of the gross estate, which is determined as provided in section 202 by including the value at the time of death of all property "to the extent of any interest therein of which the decedent has at any time made a transfer * * *".

It is idle in view of the provisions of section 209 to argue that the net estate, the transfer of which is taxed, is different from the net estate, the value of which is used in determining the amount of the tax.

Even if the law were susceptible of such a strained construction as that for which the Government contends, the argument of the Government is in other respects unsound.

We recognize that it is entirely proper for the Government to measure various excise taxes on the value of property or of the income therefrom, which is involved in connection with the exercise of the privilege which is taxed. For example, the cases of *Flint* v. *Stone Tracy Co.*, *supra*, *McCoach* v. *Minehill R. R. Co.*, 228 U. S. 295, and *Anderson* v. *Forty-Two Broadway Co.*, 239 U. S. 69, where this Court held that it was proper to measure the tax upon the right of doing business by a corporation by the total income of the corporation no matter from what source it was derived.

Also *Keeney* v. *New York*, 222 U. S. 525, and *Plummer* v. *Coler*, 178 U. S. 115, where the Court held that it was proper to measure a transfer tax by the value of the property transferred.

Maxwell v. *Bugbee*, 250 U. S. 525, is also in line with these decisions. In that case this Court held, and it would seem properly so, that in assessing a tax on the privilege to succeed to property within the jurisdiction of the state of New Jersey, that state might with propriety, in determining the rate of tax, consider the property which was not within its jurisdiction. The New Jersey statute in effect provides that in determining the rate or percentage of tax to be imposed on the transfer of property within the state of New Jersey, the taxing authorities shall consider the value of property without the state of New Jersey which is transferred by the same act to the same person. After the rate or percentage of the tax is determined, that rate is only applied to the value of the prop-

erty subject to the jurisdiction of the state of New Jersey, which is transferred. No attempt is made by indirection to assess a tax on the transfer of property not within the jurisdiction of the state. We are confident that had the state of New Jersey passed a law in form assessing a tax on the transfer of property within the jurisdiction of that state, but which had said that the measure of that tax should be an amount equal to the tax which would have been assessed on all the property transferred, both within and without the state of New Jersey, if all such property had been within the state of New Jersey, the Court would have declared that that was not a proper exercise of the taxing power of that state, and would have held that the state of New Jersey could not do indirectly that which it could not do directly, and could not assess a tax upon the transfer of property which was not within its jurisdiction.

In *Knowlton v. Moore*, 178 U. S. 41, Chief Justice White in the course of the opinion of the Court, said, at page 76:

> "Granting, however, there is doubt as to the construction, in view of the consequences which must result from adopting the theory that the act taxes each separate legacy by a rate determined, not by the amount of the legacy, but by the amount of the whole personal estate left by the deceased, we should be compelled to solve the doubt against the interpretation relied on. The principle on which such construction rests was thus defended in argument. The tax is on each separate legacy or distributive share, but the rate is measured by the whole estate. In other words, the construction proceeds upon the assumption that Congress intended to tax the separate legacies, not by their own value,

but by that of a wholly distinct and separate thing. But this is equivalent to saying that the principle underlying the asserted interpretation is that the house of A, which is only worth $1,000, may be taxed, but that the rate of the tax is to be determined by attributing to A's house the value of B's house, which may be worth a hundredfold the amount. The gross inequalities which must inevitably result from the admission of this theory are readily illustrated. Thus, a person dying, and leaving an estate of $10,500, bequeaths to an hospital $10,000. The rate of tax would be 5 per cent, and the amount of tax $500. Another person dies at the same time, leaves an estate of $1,000,000, and bequeaths $10,000 to the same institution. The rate of tax would be 12½ per cent, and the amount of tax $1,250. It would thus come to pass that the same person, occupying the same relation, and taking in the same character two equal sums from two different persons, would pay in the one case more than twice the tax that he would in the other. In the arguments of counsel tables are found which show how inevitable and profound are the inequalities which the construction must produce. Clear as it is the demonstration which they make, they only serve to multiply instances afforded by the one example which we have just given."

While refusing to express an opinion in relation thereto, the Court raised a doubt as to the validity of a law which would assess a tax on the property of one and fix the rate of tax on property of another, and stated at page 77:

"It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary pro-

vision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems."

While we recognize the War Revenue Act of 1898, in review in *Knowlton* v. *Moore*, imposed a succession, rather than an estate or transfer tax, the clear reasoning of Chief Justice White is applicable here. If it is improper to assess a tax on the house of A, only worth $1,000, at a rate to be determined by attributing to A's house the value of B's house, which may be worth a hundred fold that amount, then it is equally improper to assess a tax upon the transfer of the property owned by a decedent at the time of his death, and measure that tax by the value of the property transferred by him prior to his death, which may in turn be worth a hundredfold the amount of the property of which the decedent died possessed. To hold that such a scheme of taxation is valid, is to say that while Congress cannot directly tax a past transfer of property, it may indirectly do that which it is forbidden to do directly. This Congress cannot do. *McCoach* v. *Minehill Ry. Co.*, 228 U. S. 295; *Wallace* v. *Hines*, 253 U. S. 66.

POINT IV.

The taxation of past transfers of property under the Act of 1916 is repugnant to the Constitution of the United States and to those fundamental concepts of free government which underlie all Constitutional systems.

We endorse the views expressed in the brief submitted on behalf of the plaintiff in error to the effect that the fifth amendment applies to the whole Constitution, and that each and every portion thereof must be read in connection with that amendment. While the fifth amendment does not place an inhibition on the power of Congress to lay and collect taxes, nevertheless it does require that the tax laws shall not violate the provisions of the fifth amendment, and deprive persons of their property without due process of law. As this Court has said in speaking of the various portions of the Constitution "each and all shall be respected and observed". (Prout *v.* Starr, 188 U. S. 537-544.) Without regard, however, to whether the fifth amendment places any restraint upon the taxing power of Congress, we must nevertheless recognize that there are restraints upon that power and that Congress may not under the cloak of a taxing statute, arbitrarily take private property for public use without compensation.

Regardless of whether the fifth amendment does or does not place a restraining hand upon the power of Congress in relation to taxation, we may assert without fear of controversy, that the Courts have always recognized that a taxing statute to be valid, must be equitable in its nature

and general in character. This requisite of a tax law has sometimes been characterized as "uniformity".

While it is true that this Court has determined that the provision of the Constitution requiring that excise taxes shall be uniform has only a geographical significance, nevertheless this Court has recognized that there must be an element of uniformity in all tax laws. For example, Mr. Justice Field in his opinion in *Pollock v. Farmers' Loan and Trust Company*, 157 U. S. 429, at page 599, stated:

> "The inherent and fundamental nature and character of a tax is that of a contribution to the support of the government, levied upon the principle of equal and uniform apportionment among the persons taxed, and any other exaction does not come within the legal definition of a tax.
>
> "This inherent limitation upon the taxing power forbids the imposition of taxes which are unequal in their operation upon similar kinds of property, and necessarily strikes down the gross and arbitrary distinctions in the income law as passed by Congress. The law, as we have seen, distinguishes in the taxation between corporations by exempting the property of some of them from taxation and levying the tax on the property of others when the corporations do not materially differ from one another in the character of their business or in the protection required by the government. Trifling differences in their modes of business, but not in their results, are made the ground and occasion of the greatest possible differences in the amount of taxes levied upon their income, showing the action of the legislative power upon them has been arbitrary and capricious and sometimes merely fanciful."

Again we find this requirement for equality and uniformity pointed out by Mr. Justice Day in *Southern Ry. Co. v. Greene*, 216 U. S. 400, 417:

> "While reasonable classification is permitted without doing violence to the equal protection to the laws, such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the thing in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. 'Arbitrary selection' it has been said cannot be justified by calling it classification."

The requirement of uniformity is in the very essence of constitutional law, and although the Constitution grants to Congress powers of taxation, they are grants of lawful power with the inherent restrictions which distinguish a "government law" from a government of men who usurp arbitrary power. Whether these inherent restrictions are expressed in the uniformity clause or are found in the nature of the taxing power is immaterial. The important thing is the fundamental principle, which is a part of both, that arbitrary discrimination cannot be reconciled with law.

Attorney-General Olney and Assistant Attorney General Whitney, in their arguments in the income tax cases, admitted this inherent limitation on the general taxing power. See 157 U. S. at page 507, and 157 U. S. at page 474, where Mr. Whitney said,

> "there is, however, a certain degree of uniformity involved in the very word 'tax'; a uniformity requirement involved in the defin-

ition of that word and guaranteed by the Fifth Amendment to the Constitution. * * * A special tax cannot be laid upon A simply because he is A and not B. Such a law would be an attempt to exercise not a taxing power, but the power of eminent domain, and would require compensation for the property taken. Thus the constitution of Pennsylvania provides that taxes shall be 'uniform on the same class of subjects'; while the Supreme Court of that State has decided that this requirement is merely declaratory." Kitty Roup's case, 82 Penn. St. 211.

Chief Justice White, while insisting that the fifth amendment did not circumscribe the power of Congress in relation to taxation, nevertheless recognized that there were limitations upon such power (Knowlton *v.* Moore, 178 U. S. 41). In the excerpt from his opinion which we have heretofore quoted, he said that "aside from express constitutional restrictions" arbitrary taxation would "transcend the limitations arising from those fundamental concepts of free government which underlie all constitutional systems."

Again in *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, 24, he further stated:

> "* * * this doctrine [that the fifth amendment is not a limitation upon the taxpayer] would have no application in a case where although there was a seeming exercise of the taxing power, the act complained of was so *arbitrary* as to constrain to the conclusion that *it was not the exertion of taxation* but a confiscation of property; that is, a taking of the same in violation of the fifth amendment; or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross

and patent inequality as to inevitably lead to the same conclusion." (Italics ours.)

Again we find this statement in *Chase* v. *United States*, 222 Fed. 596:

> "No act of Congress or legislative fiat constitutes due process of law, whereby a vested right in or title to property may be either seriously impaired or destroyed." Citing *Choate* v. *Trapp*, 224 U. S. 665, 670, 677; 56 L. Ed. 941; *Jones* v. *Meehan*, 175 U. S. 1; 44 L. Ed. 49; *In re Heff*, 197 U. S. 488, 504; 49 L. Ed. 848.

The confidence of a people in the security of their property and person, free from legislative encroachment is their confidence in organized society and this is the foundation of the different states and governments of the world. This is an essential principle of governments and is elemental in the building up of governments and the peace, prosperity and happiness of its citizens. If this act of 1916 be construed to affect past transfers of property particularly a transfer such as that which is presented in these cases, how far can it be said that it complies with this general requirement in relation to taxing statutes? Does it not shock the conscience to suppose that Congress could enact a law assessing past transfers which may, and no doubt if this law be so construed, will deprive the chief objects of the testators' bounty of their inheritance?

It is usual in making such transfers for persons to reserve the income for life, of the property so transferred, thus bringing the transfers under what the government claims is the provision of this act of 1916.

It would not be difficult to find men who have given away large portions of their fortunes for charitable purposes leaving what they then supposed would be a sufficient estate to provide for those near to them, and dependent for their livelihood upon their bounty, and yet the Government would have us believe that Congress intended to and can pass a law long after these transfers have been made assessing a tax thereon, and saying that that tax shall not be paid by the persons who receive the property, but shall be paid by the executor or administrator of the decedent's estate, even if the payment of that tax absorbs the entire estate of the decedent. Nor does the Government give any consideration to the fact that these transfers are complete and unconditional and that the transferor, after the passage of the law, has no power to modify or affect the result of the taxing statute in any decree. Although he might recognize that should the act be held to affect his previous transfers of property, his widow and children would be deprived of their inheritance and he might desire to avoid the consequences of his previous generous impulses but would be absolutely powerless to do so. Can it be possible that any law would be valid which can so deprive a man of the power to effect a distribution of his property in the manner which he deems proper?

It is, of course, possible for the sovereign states to pass laws which shall control the disposition by will of decedents' estates, but surely it cannot be that the Federal Government can through the guise of a taxing statute say that those persons who have previously to the passage of that law, made transfers of their property, shall be de-

prived by reason thereof, of their power to effect a proper and equitable distribution of the property which they still retain, or that they shall be deprived of such power in relation to a large portion of the property which they have not yet disposed of. This is not taxation but confiscation.

If it could be conceived that Congress can have the right to lay a tax upon the transfer of property which has been made previously to the passage of the taxing act, that would not answer the criticism of the act of 1916, if it be construed to tax such transfers. For this act of 1916 requires the payment of the tax not by the transferees, not by the persons who have been benefited by them, but by the executor or administrator of the transferor's estate, and the act only provides for the payment of the tax by the transferee in the event that the executor or administrator has not a sufficient amount with which to satisfy the tax.

We are cognizant that this is not a succession tax, that it is not a tax upon the right of persons to receive the property, but is a tax on the transfer of the whole estate. However, without regard to the exact theory upon which it is assessed, it is certain that the tax must be paid by some person or collected out of some property, and this presents the question as to how far Congress may go in saying that A shall pay B's tax. After the transfer has been made and the transferor has parted with all title and interest in the property and all control over it, as in the case of a gift made in contemplation of death, for the Government to then say that the executor of the transferor shall pay a tax in relation to that transfer, is to require the payment of a tax on that transfer by a person who has no interest in the property transferred or

in the transfer of the property. It is submitted that this is not taxation, but arbitrary confiscation of property.

Moreover, we further submit that if this act be construed to tax past transfers, it amounts to arbitrary selection of certain transfers, rather than a proper classification of transfers for the purposes of taxation. If the act be construed to apply to past transfers, then we must consider the following.

Two remainder interests are transferred on the same day. They are both to take effect in possession on the death of the transferor. The transferor of one of the remainders dies before the Revenue Act of 1916 took effect and the other transferor dies subsequently thereto. One remainder is taxed, the other is not. Let us assume that both remainders vested absolutely at the time of the transfer thereof. The remainder which vested in possession prior to the passage of the act must therefore have been of the greater value, assuming that the amounts involved in each case were equal, but that remainder escapes taxation and the remainder which is the less valuable of the two, is subjected to the payment of a tax. Is this such reasonable classification that the Courts may not interfere?

Again let us suppose that two gifts are made in contemplation of death on the same day, and the donor in one case dies before the passage of the act and in the other instance dies subsequently thereto. Again we find the same discrimination.

It must be borne in mind that Congress has not endeavored and could not assess a tax by reason of the death of the donor or transferor, but is assessing a tax on the transfer. Can it be claimed

that it is proper classification for Congress to say, we will tax gifts the donors of which have not as yet died, but we will not tax gifts the donors of which have died. The gifts are precisely the same in both instances. In case of the gifts made in contemplation of death, they have both indefeasibly vested not only as to the title, but in possession. Can this be defined as proper classification? If Congress may thus differentiate, might it not with equal propriety say that transfers written on blue paper should be taxed while those written on white paper should not be taxed?

We are familiar with the statements that have been made that death is the generating source of the tax. That may be true in relation to taxes on transfers effected by death, that is on the transfer of property by will or under the intestate laws, but in the case of transfers made *inter vivos* it is absurd to say that death is the generating cause of such a tax. The thing taxed unless it is the property itself, is the transfer of the property, and that transfer is the generating cause and not the death of the transferor.

There are other features of the law which are also objectionable. If it be construed to tax past transfers, it assesses a tax on the value of the property at the date of death of the transferor, rather than at the date of the transfer. As the generating source of the tax is the transfer, we submit that it is an improper method of measuring the tax, to state that the value of the property transferred at a date fifteen years subsequently to the transfer, shall be the measure of the tax. As pointed out in the brief of the plaintiffs in error, very great increases in value might have resulted subsequently to the transfer, and before the

death of the transferor, increases by which neither the transferor nor the transferee are benefited. For example, the property transferred may have been sold by the transferee before the increases occurred. It would seem that such a scheme of taxation would be so arbitrary that the Courts would not sustain it as being taxation at all, but would again recognize it as a confiscation of property, or at least a taking of property without due process of law.

Can Congress say, if you transfer your property now, you shall be required to pay a tax on the value of that property at the time of your death, which may be ten, thirty or fifty years later? Is it proper to tax two transfers made ten years ago, one at the value which the property transferred now bears, and to tax a similar transfer of the identical property upon the basis of the value of that property ten years from now? A law which leads to such confusion, uncertainty and to such arbitrary exactions, cannot be considered a valid taxing statute.

It has been recognized by the state courts that transfers *inter vivos* were taxable in accordance with the law as it existed at the date of the transfer. *Matter of Sloan*, 154 N. Y. 109; *Matter of Davis*, 149 N. Y. 539; *Potter* v. *Chambers*, 63 Cal. Des. 141.

In *Matter of Hodges*, 215 N. Y. 447, the New York Court of Appeals again recognized this and stated that gifts *inter vivos* were taxable when made, which in effect recognizes that the tax must be based upon the value at the time the transfer was made.

In closing our argument, we cannot do better than to quote from the opinion of Judge Rose in

Curley v. *Tait*, 276, Fed. 840-844, where this act was under consideration. The Court had just previously in its opinion been considering the decision in *Shwab* v. *Doyle*, now pending before this Court, and stated:

> "Apparently the court's attention was not drawn to some of the consequences which, in a case like the one at bar, would follow from a retroactive construction. The present act, unlike its federal predecessor, is an estate tax, and not a tax upon the right to receive. If the government's contention be sustained, the tax will come, not as in Wright *v.* Blakeslee, *supra*, or in Cahen *v.* Brewster, 203 U. S. 543, 27 Sup. Ct. 174, 51 L. Ed. 310, 8 Ann. Cas. 215, out of the sum received by the one to whom the taxed property passes, but will be collected from one to whom it does not. Neither the Johns Hopkins Hospital nor the Johns Hopkins University will pay one cent of it. It will all come out of the property going to Gafflin's widow. Would Gafflin have made any of these transfers, had he understood by so doing he would impose a charge upon his wife of upwards of $23,000? The care with which certain limitations were introduced into each of the agreements would seem to make it highly improbable.
>
> "It is easy to conceive of a case in which a man of large estate might, before the passage of the act of 1916, have made considerable transfers to relatives, friends, or to charitable or educational institutions in somewhat the same fashion as Gafflin did, reserving for some residuary legatee a comfortable and even handsome balance of his estate. If the government is right, such legatee might be stripped of every penny of the testator's bounty. The taxes on the transferred property might amount to more than the residue of the estate, large as the testator had every

reason to suppose it would be, and the Supreme Court, in language already quoted, has held that the courts will not assume that Congress intended any such consequences. Union Pacific R. R. Co. *v.* Snow, *supra.*"

We therefore respectfully submit that this act cannot be retroactively applied and if retrospectively applied, is unconstitutional, because (1) it would be a direct tax on property without apportionment in accordance with the provisions of Sections 2 and 9 of Article I of the Constitution; (2) it is a taking of property without due process of law; (3) it is a taking of private property for public use without just compensation in violation of the fifth amendment of the Constitution; (4) it is an arbitrary selection and not a classification; and (5) to apply a tax as the government contends in this case is violative of the general principles of justice which underlie all constitutional systems.

Respectfully submitted,

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Russell L. Bradford,
of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 236.—October Term, 1921.

Union Trust Company of San Francisco and Albert Lachman, as Executors of the last will and testament of Henriette S. Lachman, deceased, Plaintiffs in Error, *vs.* Justus S. Wardell, United States Collector of Internal Revenue for the First District of California, and John L. Flynn, United States Collector of Internal Revenue for the First District of California.	In Error to the District Court of the United States for the Northern District of California.

[May 1, 1922.]

Mr. Justice McKenna delivered the opinion of the Court.

This case was argued at the same time and submitted with No. 200, *Shwab* v. *Doyle*, just decided. It involves, as that case did, the Estate Tax Act of September 8, 1916, and its different facts illustrate and aid the principle upon which that case was decided.

Plaintiffs in error are executors of the last will and testament of Henriette S. Lachman, deceased. They were also parties to a trust deed made by her during her lifetime. They sued defendant in error Wardell, he then being United States Collector of Internal Revenue for the First District of California to recover the sum of $4,545.50 that being the amount of a tax assessed against the estate of Henriette S. Lachman, upon the value of 4,985 shares of stock transferred in trust by Henriette S. Lachman to trustees upon the assumption that the Act of Congress of September 8, 1916 was applicable to the trust.

The following is a summary of the facts stated narratively. On May 31, 1901, Henriette S. Lachman was the owner of 7,475 shares of the capital stock of the S. & H. Lachman Estate, a cor-

poration. On that date she executed and delivered to Albert Lachman and Henry Lachman, her sons, the following instrument:

"Almeda, Cal., May 31, 1901,

"To Albert Lachman and Henry Lachman, my sons:

"This is to certify that I have delivered to you seven thousand four hundred and seventy-five (7,475) shares of the capital stock of the S. & H. Lachman Estate, represented by certificates numbers eleven (11), twelve (12) and thirteen (13) respectively, however, upon the following trust:

"To pay to me during my lifetime, all the income earned and derived therefrom, and, upon my death, to deliver two thousand four hundred and ninety (2,490) shares, respectively by certificates number eleven (11) unto Henry Lachman, thenceforth for his absolute property; two thousand four hundred and ninety-five (2,495) shares, represented by certificate number thirteen (13) unto Albert Lachman, thenceforth for his absolute property; and yourselves, to-wit, Albert Lachman and Henry Lachman, to hold two thousand four hundred and ninety (2,490) shares, represented by certificate number twelve (12) upon my death, in trust paying the income derived therefrom unto my daughter, Rebecca, wife of Leo Metzer, and upon the death of my said daughter, the income and earnings derived from said two thousand four hundred and ninety (2,490) shares shall be held, or expended, by you, according to your judgment, for the benefit of my grandchildren, the children of my said daughter, Rebecca Metzger, and upon the youngest of said children attaining the age of majority, all the then surviving children of my said daughter, Rebecca Metzger, shall be immediately entitled to said two thousand four hundred and ninety (2,490) shares in equal proportions.

Henriette Lachman."

The requirements of the deed were performed upon the contingencies occurring for which it provided.

On November 14, 1916, Henriette S. Lachman died, being then a resident of Alameda County, California, leaving an estate of the value of $302,963.64, which included 2,490 shares of the stock that passed to her upon the death of her husband and 25 shares of stock in a business that had been conducted by her husband but did not include the transfer of the 4,985 shares included in the trust deed.

The will was duly probated and the tax under the Act of September 8, 1916, was paid on the property which passed under her will, but no tax was paid on the 4,985 shares transferred 15 years before by the trust deed.

The Commissioner having ruled that those shares were subject to a tax, assessed against them the sum of $4,545.50. It was paid under protest and this action was brought for its recovery.

Wardell demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action against him. The demurrer was sustained and judgment entered dismissing the complaint.

Stating the contention of the plaintiffs, the court said it was that "the act should not be construed as to include transfers made prior to its passage, and that if it be so construed the act is unconstitutional." The court observed that "both of these questions were determined adversely to the plaintiffs by the Circuit Court of Appeals for the Eighth Circuit in *Schwab, Executor* v. *Doyle*, not yet reported." And said further, "In that case the transfer was made in contemplation of death, whereas in the present case the transfer was intended to take effect in possession or enjoyment at or after death, but manifestly the same rule of construction will apply to both provisions, and the same rule of constitutional validity."

The court, while apparently relying on *Shwab* v. *Doyle*, declared that it entertained "no doubt that the act was intended to operate retrospectively, and a contrary construction could only be justified on the principle that such a construction would render the act unconstitutional."

The same contentions are made against and for the ruling of the court as were made in *Shwab* v. *Doyle*. It is not necessary to repeat them. They are, with but verbal variations, the same as in *Shwab* v. *Doyle* and the Commissioner so considering, submits this case upon his brief in that.

We have there stated them and passed judgment upon that which we think determines the case, that is, the retroactivity of the Act of September 8, 1916. The facts in this case fortify the reasoning in that. In this case the Act is given operation against an instrument executed 15 years before the passage of the Act.

The record exhibits proceedings that should be noticed. The demurrer of Wardell was sustained to the complaint, and a judgment of dismissal entered January 13, 1921.

On February 2, 1921, plaintiffs gave notice of a motion to substitute John S. Flynn as defendant in the place and stead of

Wardell in so far as the action was against Wardell in his official capacity, and to permit it to be continued and prosecuted against him so far as it was against him personally.

The grounds of the motion were stated to be that he had resigned and Flynn had been appointed his successor and was then the acting Collector.

On February 7, 1921, the motion was granted. The order of the court recited the resignation of Wardell and the succession of Flynn. And it being uncertain as to whether this was a proper case for the substitution of Flynn or was one which should proceed against Wardell, and it appearing to the court on motion of plaintiffs that it was necessary for the survivor to obtain a settlement of the questions involved, it was ordered that so far as the action was against Wardell in his official capacity, it might be sustained against Flynn as his successor, and that so far as it was against Wardell personally, it should be continued against him. And it was ordered that the action should thereafter proceed against Flynn and Wardell without further pleadings or process.

On February 9, 1921, Flynn filed an appearance by attorneys which recited that he had been substituted in the place of Wardell in so far as the action was against Wardell in his official capacity, and thereby appeared in the action as such defendant.

It will be observed that there was no resistance to the motion of substitution of Flynn nor exception by him, and that he almost immediately appeared in the action in compliance with the order of the court. The subsequent proceedings were directed as much against him as against Wardell, the bond upon the writ of error running to both.

However, this Court decided in *Smietanka, Collector* v. *Indiana Steel Company*, October 24th of this term, that a suit may not be brought against a Collector of Internal Revenue for the recovery of a tax, in the collection and disbursement of which, such officer had no agency. We think the bringing of Flynn into the case was error. Therefore, upon the return of the case to the District Court, he shall be permitted to set up the defense of non-liability, if he be so advised, and, if he set up the defense, it shall be ruled as sufficient for the reasons we have given.

Judgment reversed and cause remanded for further proceedings in accordance with this opinion.

suppose it would be, and the Supreme Court, in language already quoted, has held that the courts will not assume that Congress intended any such consequences. Union Pacific R. R. Co. vs. Snow, supra."

CONCLUSION.

It is respectfully submitted that the Act of 1916 should not be construed as taxing a decedent's estate in respect of transfers made before the passage of the statute, and that the judgment of the lower Court construing it retroactively should be reversed.

Respectfully submitted,

J. WALLACE BRYAN,

CHARLES McH. HOWARD,

AMICI CURIAE.

Washington, April 10, 1922.

APPENDIX.

UNITED STATES DISTRICT COURT.

District of Maryland.

No. 1109—At Law.

Filed November 29, 1921.

JOHN J. CURLEY ET AL.

VS.

GALEN L. TAIT ET AL.

J. Wallace Bryan, *Charles McHenry Howard* and *Joseph C. France* for the plaintiffs.

Robert R. Carman for the defendants.

ROSE, D. J.—

The plaintiffs, as executors of the executrix of the late William H. Grafflin, who died July 7, 1917, are here seeking to recover $23,927.22 paid the defendant under protest as an estate tax upon $285,655, being the aggregate value, at the testator's death, of various securities transferred at different times, within seven and a half years before he died, to either the Johns Hopkins Hospital or the Johns Hopkins University. As neither institution was, in the view of the Government, to get any substantial benefit from the property until after the tes-

APPENDIX (*Continued*).

tator's death; the defendant says that the transfers were not intended to take effect in enjoyment until that time and that in consequence, the tax was properly collected.

The facts said to make the other securities taxable did not exist as to some Russian Roubles Internal 5s, worth, at the testator's death, $2,255. The inclusion by the Government of these in its tax charge appears to have been the result of some mistake or misunderstanding. They were given by Grafflin outright, and as neither they nor any of the other property invloved in this litigation was transferred in contemplation of death, the demurrer, so far as concerns the sum exacted upon them, must necessarily be overruled.

There are various minor differences in the terms of the transfers, but they were all alike in that by each of them, an out and out gift of the securities was made, and consummated by the issue and delivery of new certificates in the name of the grantee. It was expressly declared that the property conveyed was not charged with any trust. On the other hand, the hospital, or the university, as the case might be, covenanted in each of three agreements of transfer, that it would pay the net income during Grafflin's life to him, and after his death, and during such time as his wife should survive him, to her. After both of them were gone, the income, as well as the principal, was to be applied to the use of the grantee. The remaining one of the four, as it happened the earliest of them all in point of time, was in the nature of a marriage settlement. It recited that Grafflin was about to be married, and the hospital, with whom this particular agreement was made, covenanted to pay after the marriage was solemnized, the net income to the wife during her life, and afterwards to him during his life if he should prove to be the survivor.

APPENDIX (*Continued*).

By the terms of one of the agreements, the grantee, during the continuance of the life estate, was, after paying taxes, to retain 1 per cent. of the income for itself; by another 2½ per cent.; and by the others 5 per cent., but in that case it was itself to pay the taxes, whether they amounted to more or less than the 5 per cent. retained.

By most of them it was provided that anything in the nature of stock or bond dividends or payments on account of cumulative preferred dividends then in arrear, should be treated as additions to principal. To the man in the street, the enjoyment of a share of stock would be found in the right to apply to his own uses the dividends that might be declared upon it, and from this standpoint there is so much force in the Government's contention that neither hospital nor university enjoyed their gifts during Grafflin's lifetime, that without further discussion, it may, for the purpose of this case, be assumed to be sound, although it will be unnecessary so to decide. Even so, and upon the further assumption to be hereafter critically examined, that the statute is retroactive covers these transactions entered into years before it was enacted, the query remains, was the defendant justified in requiring the payment of the tax upon the full value of the stock transferred in contemplation of Grafflin's marriage, to the hospital, which covenanted to pay the net income thereof to the prospective wife during her life. Grafflin reserving nothing of substance to himself except the right to the net dividends during so much of his life as should extend beyond hers, thus making his interest dependent altogether upon the contingency that he should prove to be the survivor? The Government answers yes. It says that the hospital

was not to enjoy the stock until after his death. True, but is that all that is necessary?

If all beneficial ownership and possession irrevocably passes from the transferror at the time of the transfer, it would seem to be immaterial whether it goes to one person or to several, and if to several, whether their enjoyment is to be simultaneous or successive, and if the latter, at what time or upon the happening of what event the rights of one give place to those of another. In the instant case, had the agreement provided that after Mrs. Grafflin's death and during any period he survived her, the income should be paid to some one other than himself, there could, I imagine, have been no claim that any estate tax was chargeable. It follows that all that is taxable, if anything, is, in the language of the statute, "the interest" which he retained for himself. At the time the transfer was made, it was uncertain whether it would turn out to be worth much, little or nothing. As he died before his wife, it proved to be a fact valueless. If its taxable worth is to be ascertained as of the date of his death, as is the clear statutory rule when applicable, there is nothing to tax. Of course, at the time the agreement was made, the retained interest had an ascertainable value to those concerns which deal in insurance policies, annuities and like interests, the worth of any one of which is altogether uncertain, but the aggregate value of any large number of which can, from the mortality tables, be determined with approximate exactness.

The question of how much a contingent interest as Grafflin retained for himself under this agreement should be valued for estate tax purposes is not at all clear.

APPENDIX (*Continued*).

Apparently what the statute had in mind in declaring that the value of the gross estate of the decedent shall be determined by including the value at the time of his death, of all property, etc., is what it said. and no more. That is to say, the value of the property is to be then determined as of that date and not his interest in it, for if the latter were the case, any property which had been transferred by him in such manner that his interest ceased at death, would have no taxable value, and that is clearly that the statute does not mean.

At the hearing the Government was so confident that it was entitled to tax the full value of his interest and the plaintiffs so certain that none of it should be taxed, that neither of them discussed the question now mooted. As from what has been said it follows that the entire interest was not taxable, the demurrer to so much of the plaintiff's declaration as seeks to recover the tax exacted on all of it, must be overruled. The question of whether the Government was entitled to any part of the tax less than the whole need not be passed upon and should not be until the Court is enlightened by further argument.

All the above will be unimportant if the conclusion to which I have arrived upon another contention of the plaintiffs shall ultimately be sustained. They say that no tax at all was collectable, because the transfers here in controversy were all made before the statute was enacted. To this the Government has two answers. It says that the statute itself declares that it has reference to a transfer made "at any time." These words, however, are susceptible of a reasonable construction which could limit them to transactions taking place thereafter.

APPENDIX (*Continued*).

Congress may well have thought it important to make clear that the length of time before the death at which a transfer took place was not to be a controlling circumstance. The words used were apt to express that intention, and may well have been employed with the limitation usually implied that they were not to affect transactions which had already taken place. The rule, of course, is that statutes are not to be given a retroactive construction when by doing so, "antecedent rights are affected or human conduct given a consequence it did not intend." Union Pacific Railroad Company vs. Snow, 231 U. S. 204-213.

For reasons which will be hereinafter set forth, this statute, if retroactively applied, will, in some instances, cause serious hardship and injustice. The courts have gone to great lengths in construing away language which in its more natural import, seems to indicate that the Legislature intended the act should affect transactions which had been entered into before its passage. Union Pacific R. R. Co. vs. Laramie Stock Yards Co., 231 U. S. 190. If this were a case of first impression, I personally would have no hesitation whatever in holding that the Act of 1916 does not affect transfers made before it was passed.

But the Government says in the second place, that in Shwab vs. Doyle, 269 Fed. 321, the Circuit Court of Appeals for the Sixth Circuit held the act to be retroactive. Diversity of decision is especially unfortunate in the construction of tax statutes in which uniformity of interpretation and application are so important. Moreover, a court of equal rank would hesitate long before differing with a tribunal so eminent for wisdom and learning as that which has spoken on the subject. Nothing short of

the clearest conviction will justify a district judge in doing so, but there are rare occasions in which he must, because as the law does not make a decision of a Circuit Court of Appeals binding outside of its own circuit, the responsibility of determination is one from which he cannot escape.

In Shwab vs. Doyle, supra, the case of Wright vs. Blakeslee, 101 U. S. 174, was cited as authority for holding a similar statute retroactive. The act there construed imposed a tax upon the succession; that is, upon the right to receive, and was levied upon what passed to the heir, devisee, legatee, distributee or successor, and not upon the estate. Knowlton vs. Moore, 178 U. S. 41, 24 et seq. The distinction is neither pedantic nor technical, but as applied to the matter now in hand, is in the highest degree practical.

In Shwab vs. Doyle, supra, it was held that the addition made by the Act of 1918 (40 Stat. 1097), of the words "whether such transfer is made or occurred before or after the passage of the act," was a legislative construction rather than an amendment of the statute now under consideration. The Supreme Court has since taken the opposite view, as to other broadening language then first introduced. U. S. vs. Field, 255 U. S.

The case before the Circuit Court of Appeals was one of a transfer made in contemplation of death. It answered the objection to the practical hardships which a retroactive construction might entail by saying, "It is true that if the tax before us is retroactive, it might, at least theoretically, affect conveyances made many years before a grantor's death, but this consideration is hardly practi-

cal. Congress would, we think, scarcely be impressed with a practical likelihood that a transfer made many years before a grantor's death, say twenty-five years, to use plaintiff's suggestion, would be judicially found to be made in contemplation of death under the legal definition applicable thereof, and without the aid of the two years prima facie provision."

Apparently, the Court's attention was not drawn to some of the consequences which in a case like the one at bar, would follow from a retroactive construction. The present act, unlike its Federal predecessor, is an estate tax and not a tax upon the right to receive. If the Government's contention be sustained, the tax will come, not as in Wright vs. Blakeslee, supra, or in Cahen vs. Brewster, 203 U. S. 543, out of the sum received by the one to whom the taxed property passes, but will be collected from one to whom it does not. Neither the Johns Hopkins Hospital nor the Johns Hopkins University will pay one cent of it. It will all come out of property going to Grafflin's widow. Would Grafflin have made any of these transfers had he understood by so doing he would impose a charge upon his wife of upwards of $23,000? The care with which certain limitations were introduced into each of the agreements would seem to make it highly improbable. It is easy to conceive of a case in which a man of large estate might, before the passage of the Act of 1916, have made considerable transfers to relatives, friends or to charitable or educational institutions in somewhat the same fashion as Grafflin did, reserving for some residuary legatee, a comfortable and even handsome balance of his estate. If the Government is right, such legatee might be stripped of every penny of the testator's bounty. The taxes on the transferred property might amount to more

APPENDIX (*Concluded*).

than the residue of the estate, large as the testator had every reason to suppose it would be, and the Supreme Court, in language already quoted, has held that the courts will not assume that Congress intended any such consequences. Union Pacific R. R. Co. vs. Snow, supra.

It follows that the demurrer to the declaration must be overruled generally.

UNION TRUST COMPANY OF SAN FRANCISCO ET AL., AS EXECUTORS OF LACHMAN, *v.* WARDELL, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF CALIFORNIA, ET AL.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 236. Argued April 17, 18, 1922.—Decided May 1, 1922.

1. The Estate Tax Act of 1916, did not apply to transfers in contemplation of death made before its passage. P. 540. *Shwab* v. *Doyle, ante,* 529.
2. A collector of internal revenue is not liable to an action for recovery of a tax collected by his predecessor in office. P. 541. *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1.

273 Fed. 733, reversed.

Error to a judgment of the District Court sustaining a demurrer and dismissing the complaint in an action to recover a sum collected as an estate tax.

Mr. Garret W. McEnerney, with whom *Mr. William D. Guthrie, Mr. E. S. Heller, Mr. Isaac Frohman* and *Mr. Bernard Hershkopf* were on the brief, for plaintiffs in error.

Mr. James A. Fowler, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for defendants in error.

Mr. Charles E. Hughes, Jr., and *Mr. Allen S. Hubbard*, by leave of court, filed a brief as *amici curiae*.

Mr. Mansfield Ferry, Mr. C. Alexander Capron and *Mr. Russell L. Bradford*, by leave of court, filed a brief as *amici curiae*.

Mr. J. Wallace Bryan and *Mr. Charles McH. Howard*, by leave of court, filed a brief as *amici curiae*.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This case was argued at the same time and submitted with No. 200, *Shwab* v. *Doyle*, just decided, *ante*, 529. It involves, as that case did, the Estate Tax Act of September 8, 1916, 39 Stat. 777, and its different facts illustrate and aid the principle upon which that case was decided.

Plaintiffs in error are executors of the last will and testament of Henriette S. Lachman, deceased. They were also parties to a trust deed made by her during her lifetime. They sued defendant in error Wardell, he then being United States Collector of Internal Revenue for the First District of California, to recover the sum of $4,545.50, that being the amount of a tax assessed against the estate of Henriette S. Lachman upon the value of 4,985 shares of stock transferred in trust by Henriette S. Lachman to trustees, upon the assumption that the Act of Congress of September 8, 1916, was applicable to the trust.

The following is a summary of the facts stated narratively. On May 31, 1901, Henriette S. Lachman was the owner of 7,475 shares of the capital stock of the S. & H. Lachman Estate, a corporation. On that date she executed and delivered to Albert Lachman and Henry Lachman, her sons, the following instrument:

"Alameda, Cal., May 31, 1901.

"To Albert Lachman and Henry Lachman, my sons:

"This is to certify that I have delivered to you seven thousand four hundred and seventy-five (7,475) shares of

the capital stock of the S. & H. Lachman Estate, represented by certificates numbers eleven (11), twelve (12) and thirteen (13) respectively, however, upon the following trust:

"To pay to me during my lifetime, all the income earned and derived therefrom, and, upon my death, to deliver two thousand four hundred and ninety (2,490) shares, represented by certificates number eleven (11) unto Henry Lachman, thenceforth for his absolute property; two thousand four hundred and ninety-five (2,495) shares, represented by certificate number thirteen (13) unto Albert Lachman, thenceforth for his absolute property; and yourselves, to-wit, Albert Lachman and Henry Lachman, to hold two thousand four hundred and ninety (2,490) shares, represented by certificate number twelve (12) upon my death, in trust paying the income derived therefrom unto my daughter, Rebecca, wife of Leo Metzger, and upon the death of my said daughter, the income and earnings derived from said two thousand four hundred and ninety (2,490) shares shall be held, or expended, by you, according to your judgment, for the benefit of my grandchildren, the children of my said daughter, Rebecca Metzger, and upon the youngest of said children attaining the age of majority, all the then surviving children of my said daughter, Rebecca Metzger, shall be immediately entitled to said two thousand four hundred and ninety (2,490) shares in equal proportions.

Henriette Lachman."

The requirements of the deed were performed upon the contingencies occurring for which it provided.

On November 14, 1916, Henriette S. Lachman died, being then a resident of Alameda County, California, leaving an estate of the value of $302,963.64, which included 2,490 shares of the stock that passed to her upon the death of her husband and 25 shares of stock in a business that had been conducted by her husband, but did not include the transfer of the 4,985 shares included in the trust deed.

The will was duly probated and the tax under the Act of September 8, 1916, was paid on the property which passed under her will, but no tax was paid on the 4,985 shares transferred 15 years before by the trust deed.

The Commissioner having ruled that those shares were subject to a tax, assessed against them the sum of $4,545.50. It was paid under protest and this action was brought for its recovery.

Wardell demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action against him. The demurrer was sustained and judgment entered dismissing the complaint. 273 Fed. 733.

Stating the contention of the plaintiffs, the court said it was that "the act should not be construed as to include transfers made prior to its passage, and that, if so construed, the act is unconstitutional." The court observed that "both of these questions were determined adversely to the plaintiffs by the Circuit Court of Appeals for the Eighth Circuit in *Shwab, Executor,* v. *Doyle,* 269 Fed. 321." And it said further, "In that case the transfer was made in contemplation of death, whereas in the present case the transfer was intended to take effect in possession or enjoyment at or after death; but manifestly the same rule of construction will apply to both provisions, and the same rule of constitutional validity."

The court, while apparently relying on *Shwab* v. *Doyle,* declared that it entertained "no doubt that the act was intended to operate retrospectively, and a contrary construction could only be justified on the principle that such a construction would render the act unconstitutional."

The same contentions are made against and for the ruling of the court as were made in *Shwab* v. *Doyle, ante,* 529. It is not necessary to repeat them. They are, with but verbal variations, the same as in *Shwab* v. *Doyle,*

and the Collector so considering, submits this case upon the brief in that.

We have there stated them and passed judgment upon that which we think determines the case, that is, the retroactivity of the Act of September 8, 1916. The facts in this case fortify the reasoning in that. In this case the act is given operation against an instrument executed 15 years before the passage of the act.

The record exhibits proceedings that should be noticed. The demurrer of Wardell was sustained to the complaint, and a judgment of dismissal entered January 13, 1921.

On February 2, 1921, plaintiffs gave notice of a motion to substitute John L. Flynn as defendant in the place and stead of Wardell, in so far as the action was against Wardell in his official capacity, and to permit it to be continued and prosecuted against him so far as it was against him personally.

The grounds of the motion were stated to be that he had resigned and Flynn had been appointed his successor and was then the acting Collector.

On February 7, 1921, the motion was granted. The order of the court recited the resignation of Wardell and the succession of Flynn. And it being uncertain as to whether this was a proper case for the substitution of Flynn or was one which should proceed against Wardell, and it appearing to the court on motion of plaintiffs that it was necessary for the survivor to obtain a settlement of the questions involved, it was ordered that so far as the action was against Wardell in his official capacity, it might be sustained against Flynn as his successor, and that so far as it was against Wardell personally, it should be continued against him. And it was ordered that the action should thereafter proceed against Flynn and Wardell without further pleadings or process.

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the place of Wardell in so far as the action was against Wardell in his official capacity, and thereby appeared in the action as such defendant.

It will be observed that there was no resistance to the motion of substitution of Flynn nor exception by him, and that he almost immediately appeared in the action in compliance with the order of the court. The subsequent proceedings were directed as much against him as against Wardell, the bond upon the writ of error running to both.

However, this court decided in *Smietanka* v. *Indiana Steel Co.,* 257 U. S. 1, that a suit may not be brought against a Collector of Internal Revenue for the recovery of a tax, in the collection and disbursement of which such officer had no agency. We think the bringing of Flynn into the case was error. Therefore, upon the return of the case to the District Court, he shall be permitted to set up the defense of non-liability, if he be so advised, and, if he set up the defense, it shall be ruled as sufficient for the reasons we have given.

Judgment reversed and cause remanded for further proceedings in accordance with this opinion.